PART I.

INTRODUCTORY CHAPTER.

ABSTRACT OF THE CHAPTER

Object of the Manual

The object aimed at in this Manual is to put together briefly and in a simple and compact form such information, legal and other, as appears directly useful, if not indispensable, to executive officers whose duties require them to enter into or to administer contracts on behalf of Government. No attempt is made in it to render reference to the legal advisers of Government unnecessary, when time admits of that course, and the importance of the matter justifies it. Nothing could be more inexpedient than to attempt the conversion of executive officers into "amateur lawyers." It is, however, found in practice that legal questions arise daily in the matter of contracts which must be decided on the spot by the officer immediately

Why it is needed.

concerned, and that in many instances the interests of Government suffer simply through ignorance of the law applicable to particular facts—ignorance for which executive officers cannot at present be held responsible, inasmuch as they receive no legal training and are not supplied with the means of acquiring any legal knowledge in a concise, plain, intelligible form. There are, moreover, many non-legal matters associated with Public Works Department contracts as to which general rules for observance, based on experience, are undoubtedly required, but have never yet been formulated. It is hoped that this Manual will to some extent fill the gap. To try to make it exhaustive would defeat the features chiefly studied in it,—brevity and simplicity; but, so far as it goes, officers may rest assured that it contains only what is of practical use in ordinary administration.

Its chief features

Rudimentary knowledge of law needed by all.

It would, of course, be out of place for executive officers to attempt an elaborate study of the law. But so much of the law as is here set forth should be accessible to and understood by all, for, without knowing the elementary propositions of the law of contract and evidence and some provisions of the law of registration, limitation, stamps, and so on, no person can safely enter into contractual relations with another, however honest and fair-minded the latter may be In these days, moreover, it is unfortunately notorious that the large increase in the number of lawyers, and the consequent anxiety of many of them to foment disputes and litigation by which they live, have supplied an additional reason for helping Government officers in this branch of their work. Not merely such differences and misunderstandings as are due to genuine ignorance and mistake have to be prevented · it is also necessary to bear in mind that there is always danger of *intentional* chicanery on the contractor's part, and to use every effort to frustrate it by a careful selection of contractors, by the use of clear and well-chosen language, by duly observing the requirements of the law, by securing indisputable proof of what is agreed upon, by efficiently safeguarding that proof for time of need, and so on. It is the purpose of this

Danger of intentional chicanery

Purpose of the Manual.

Manual to further these objects in popular language which all can readily comprehend, and in the shortest space compatible with utility, by putting officers on their guard against the commoner legal pitfalls into which experience has shown that they are apt to stumble in their dealings with contractors, and by an attempt to classify and explain some other matters specially worthy of attention in this connexion.

The most interesting and helpful arrangement appears to be to commence by setting forth selected parts of certain essential Acts of the Legislature, explaining generally the value of each law quoted and showing how it might come into the actual every-day business of any executive officer, and then, having familiarised the reader with so much, and only so much, law as seems really necessary for the purpose in hand, to discuss in turn (in Chapter VIII) such subjects as are of undoubted practical importance in dealing with contractors. Arrangement of contents

It will then remain to furnish (in Chapter IX) a few simple forms not at present supplied to officers, but valuable for ordinary use, such as notices of rescission of contracts and the like. These two chapters are interleaved, in deference to a suggestion of the Government of Bombay. The Resolution of Government conferring on officers of Government powers to execute contracts on behalf of the Secretary of State, Statutory rules as to the making of contracts on behalf of Government, together with certain parts of the Public Works Department Code relating to the same subject, the Punjab Civil Suit Rules, a few extracts from the Code of Civil Procedure concerning Government suits, the Indian Arbitration Act and a few of the more generally useful of the prescribed Forms of agreement, are appended to Part I as Appendices A, B, C, D, E, F and G,respectively, so that the Maunal may be a fairly complete legal guide to the powers and duties of all executive officers competent to contract for Government. An Eighth Appendix, H, consists of a short glossary of more or less legal and technical terms used in the Manual, and is furnished *by request*. The above, with an index, completes Part I of the Manual.

The appendices and index are also interleaved, and a few blank sheets for notes are bound in at the end of Part I.

The legal Chapters II to VII of the Manual will probably be found by most readers to be neither attractive nor very easy to grasp; but a general acquaintance with their contents is indispensable to a thorough comprehension of Chapter VIII (for this reason designedly placed last), consisting of practical suggestions which the compiler has done his very best to express simply, clearly, and in a fairly readable way: also to intelligent use of the forms provided in Chapter IX. It is by no means necessary that officers should thoroughly acquire and absorb all the law quoted in Chapters II to VII. If they will only study them sufficiently to master the contents and the arrangement of them generally, they can thereafter refer to them for guidance as particular points arise. The " second kind of knowledge "—to know where to find information when wanted—is all that it is necessary to secure as regards these chapters An abstract of contents is prefixed to each chapter, with references to pages of Chapters II—VII, and to paragraphs of Chapter VIII. It is hoped that this device will prove useful. The above concludes Part I of the Manual.

It is further proposed to supply the offices of all Executive Engineers with a collection of the Acts of the Legislature referred to in the Manual, so that there can be no difficulty in supplementing the portions quoted in it when necessary. These, bound in one volume, constitute Part II of the Manual.

CHAPTER II.

THE INDIAN EVIDENCE ACT, I OF 1872.

ABSTRACT OF THE CHAPTER.

PART II OF THE ACT. ON PROOF

PART III OF THE ACT ON PRODUCTION AND EFFECT OF EVIDENCE

No justification for the introduction of portions of this Act into the present Manual is required. A sound knowledge of the leading provisions of the Law of Evidence should form part of the education of every man and woman. In the investigation of all disputed facts the rules of evidence are wisely followed or foolishly disregarded by the individual concerned, although he may never have even heard of the term, much less studied the subject. At every stage of an executive officer's proceedings concerning contracts, some principles of evidence must apply to his action. His enquiries prior to the selection of a contractor, his procedure in framing the contract, the steps taken by him in the course and on the completion of it, and his whole preparation of a case for legal advice, are all dependent for their correctness, appositeness, and completeness on his intelligently understanding the relevancy and irrelevancy of facts, and knowing how relevant facts ought to be established. Portions of the Act why introduced.

There is no branch of the law more worthy of popular respect than the Law of Evidence. It has certainly not yet been brought to perfection; but as it now stands, it is pervaded by common sense through- Law of Evidence specially worthy of popular respect.

out, enlightened by judicial experience, and founded upon what a great writer has justly called "the philosophy of common life." Some substantive laws—*e.g.*, the English Marriage Law—are open to challenge as one-sided and made by one class for its own benefit at the expense of another. The Law of Evidence, however, is free from any such reproach; its particular provisions may be wise or unwise, but at least they are wholly impartial, and rest exclusively on abstract considerations which the wisest and most experienced judicial minds of our time deem conclusive in their favour.

Comparison to the rules of Logic

Although these provisions, when carefully considered, will for the most part be seen to be expedient, their expediency is by no means obvious at first sight. Study of the Law of Evidence is very similar to that of formal and inductive Logic. In ordinary cases people who do not even know what the term 'syllogism' means may reason with correctness. But it is plainly of value to every reasoner to understand the reasoning process,—to perceive definitely and to have the means of concisely demonstrating *why* one conclusion is sound and another is fallacious. The rules of Logic, inductive and deductive, furnish the requisite knowledge. Exactly in the same way, a clear comprehension of the abstract principles and the rules of evidence will afford invaluable help in the investigation and disposal of all those questions of fact which present themselves for decision in everyday life.

Three main principles underlie the law of evidence.

In order to reach a safe conclusion on any question of fact, three main principles of investigation must be observed: (1) that all facts which really are relevant shall so far as possible be ascertained and given their due weight; (2) that no facts not really relevant shall be allowed any weight; and (3) that in respect of every fact deemed relevant, the best possible form of proof available shall be secured. Now, the science of applying these three principles in the best and wisest way is embodied in the Law of Evidence. No vindication of the first principle is required. As to the second, experience shows that clear and strin-

gent rules are necessary to keep the human mind to the point. "Those systems" (says Mr. Justice Field), "which, like the French, dispense with all rules of evidence obtain no other result from the want of them than floods of irrelevant gossip and collateral questions sufficient to confuse the strongest head and distract the most attentive mind." Again (remarks the same learned author), "a necessary consequence of the introduction of collateral and irrelevant questions is to prolong and extend the proceedings to an inconvenient and useless extent." "These evils are wholly prevented, or to a great extent obviated, by proper rules of evidence." The third principle needs no comment.

The "relevancy of facts" and "the sort of evidence by which particular facts ought to be proved" are, then, the two great points dealt with by the Law of Evidence, and all its provisions, down to the smallest detail, ultimately fall under one or other of these two heads. The great practical value of general rules which materially help a person to reach a correct conclusion on disputed questions of fact, and with the least practicable effort and delay, must be evident to all.

Summary of the Act.

Part I of the Act deals with the **relevancy of facts**, *i.e.*, it enumerates those facts which are alone admissible as evidence. The rest of the Act, which is subdivided into Parts II and III, deals in Part II with **proof** (namely, the particular form of evidence required, if any, to establish particular facts), and in Part III it furnishes certain definite rules as to the **production and effect of evidence.**

Only so much of the above provisions as seems directly serviceable to an executive officer will now be reproduced. Part III will be almost entirely omitted.

PART I OF THE ACT.

RELEVANCY OF FACTS.

PRELIMINARY.

"Fact." 3. "Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

"Relevant" One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue." The expression "facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability asserted or denied in any suit or proceeding necessarily follows.

"Evidence." "Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry:

such statements are called oral evidence;

(2) all documents produced for the inspection of the Court:

such documents are called documentary evidence.

"Proved" A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved" A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved." A fact is said not to be proved when it is neither proved nor disproved.

Illustration of what "fact" includes. NOTE.—A recent suit against Government, which may henceforth be referred to as "the collision case," affords a good example of the necessity to clearly understand what the term 'fact' includes. The plaintiff claimed damages on the basis that in a certain

collision he suffered organic injury of the spine. This was an assertion of a fact. Now, his assertion did not prove the fact. But it is proved that the plaintiff at the time of the collision did *say certain words* to the same effect. This is another, and a very material fact, quite distinct from the question whether those words were true or false. Were the fact (if known) of this speech having been made at the time omitted in stating a case for legal opinion, the omission would be a serious one, and it actually was omitted from the case as stated by the railway.

"*Proved.*" "Absolute certainty amounting to demonstration," says a writer, "is seldom to be had in the affairs of life, and we are frequently obliged to act on degrees of probability which fall very short of it indeed. Practical good sense and prudence consist mainly in judging aright whether in each particular case the degree of probability is so high as to justify one in regarding it as certainty and acting accordingly." The present section lays down a sensible test for all cases alike, in Court or out of Court, official or private — The correct meaning of the term "proved."

OF THE RELEVANCY OF FACTS.

11 NOTE.—The question whether to burden this Manual with the whole or parts of sections 5—16 or not is a difficult one. After much consideration it has been decided to do so, omitting some of the less commonly useful parts. Their illustrations have been left out entirely. These, like many others, can (and ought to be) studied in the Act itself. These sections are not easy to grasp, but they are of inestimable value; they are the backbone of the entire law. To know exactly the true limits of the relevancy of facts is one of the most valuable intellectual acquisitions which any person can make. Persons unacquainted with the logical limits of relevancy labour under grave disadvantage in endeavouring to investigate disputed facts, or to state for legal opinion a case in which such facts are involved. Nothing is more painfully common than to discover, sometimes too late, that eminently material facts have been omitted by officers through ignorance on this subject when consulting their legal — Reasons for introducing parts of sections 5—16.

advisers; and it is also too often found that from the same cause evidence of great importance to Government interests has been allowed to perish. In a case which ran for years a tortuous course in the civil courts, the claim could have been summarily demolished by the mere production of certain departmental daily registers. But unfortunately, notwithstanding the fact that a dispute was notoriously imminent, these registers were destroyed in servile obedience to departmental rule, and proof, expressly declared relevant by section 35 of the Act, was lost. There is no end to the concrete examples of this description which could be given; but they would be superfluous. The principle which will be most safely followed by executive officers is this: *when in doubt, preserve the evidence, and mention it in stating a case.* Irrelevant facts can easily be cut out; but relevant evidence once destroyed, or not brought to the knowledge of a legal adviser, is clear loss. It is not suggested that officers should attempt to commit these difficult sections to memory. It will be quite sufficient to read carefully through them, so as to gain a sound general idea of 'relevancy of facts.' Thereafter, these provisions can always be looked up when guidance is needed.

Sound principle to follow when in doubt as to relevancy.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Relevancy of facts forming part of same transaction.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Motive or preparation.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose— Facts necessary to explain or introduce relevant facts

11. Facts not otherwise relevant are relevant— When facts not otherwise relevant become relevant.

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant. In suit for damages, facts tending to enable Court to determine amount are relevant.

14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant. Facts showing existence of state of mind or of body or bodily feeling

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

15 When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned is relevant. Facts bearing on question whether act was accidental or intentional

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. Existence of course of business when relevant.

Admissions.

Before quoting the sections dealing with *admissions*, it may be well to say a few words concerning them. Admissions are merely a particular class of facts, not always or in all circumstances relevant, and Limits of the relevancy of admissions.

therefore a class requiring exceptional explanation. To be relevant, the admission must be made (1) by one of certain *persons*, and also (2) in certain *circumstances;* otherwise it is inadmissible in evidence. Here, as elsewhere, the law rests on common sense, refined and aided by judicial experience. Sections 18—20 enumerate the *persons* whose admissions can be relevant: sections 21—23 describe the *extent* to which alone this relevancy is recognised. Admissions are not *conclusive* proof of the matters admitted (section 31): for example, if a tradesman sends a stamped and receipted bill, it is an admission of payment, but he may prove that he never received the money. It is only when an admission amounts to an " estoppel" which will be explained further on, that it is conclusive.

Admission defined.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances hereinafter mentioned.

Admission—by party to proceeding or his agent;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

by suitor in representative character.

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by—

by party interested in subject matter;

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by person from whom interest derived.

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

Admissions by persons whose position must be proved as against party to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions. Admissions by persons expressly referred to by party to suit.

Illustration.

The question is whether a horse sold by *A* to *B* is sound.

A says to *B*—' Go and ask *C*, *C* knows all about it ' *C's* statement is an admission.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:— Proof of admissions against persons making them, and by or on their behalf.

(1) An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the son making it if it is relevant otherwise than as an admission.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question. When oral admissions to contents of documents are relevant.

23 In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. Admissions in civil cases when relevant.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126

NOTES.—1. The object of section 23 is clear: if overtures between persons likely to go to law were not privileged from disclosure, no person could safely make an offer of compromise. It is, however, 'to the interest of the State that litigation should cease,' and Object of section 23 explained and illustrated.

pacific proposals of this kind are therefore declared inadmissible in evidence. Officers should very carefully bear this section in mind. Much stress was unscrupulously laid upon the fact that after the accident out of which 'the collision case' arose, the Manager of the Railway sent his Traffic Superintendent to call on the person said to have been hurt and to enquire after his health. Of course this mere act of courtesy was not intended by the Manager to imply any admission of liability; but if that officer had taken the precaution to inform the passenger in writing that his inquiries were "without prejudice," this would have saved the defence an infinity of trouble.* It will be noticed that *written* intimation is advocated.

Special value of written communications.

There is no more excellent maxim or one which will bear more frequent repetition than that embodied in the words "*vox emissa volat, litera scripta manet.*"† As a matter of fact, what passed at the interview in question became the subject of some extremely hard swearing. The only safe course, where an important communication has to be made, and especially to a person suspected of unfair dealing, is to make it in writing, retaining a copy. The fact, the date, and the exact terms of the communication can be proved with ease and beyond controversy, while an oral one may be denied altogether, or may be materially perverted or falsely attributed to another date. All these devices were attempted in 'the collision case.'

All correspondence with opposite party should be guarded.

2. Not merely offers of compromise, but all correspondence whatever with persons preferring claims against Government, or likely to do so, should be headed "without prejudice." By this precaution statements liable otherwise to be proved as admissions are protected, and departmental officers can correspond freely with the opposite party without fear of weakening the legal position of their employer.‡

Statements by persons who cannot be called as witnesses.

Cases in which statement of relevant

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has

* See Chapter IX, Form No. 1.

† "The uttered word flies away, the written letter remains."

‡ See rule 3, Civil Suit Rules, Appendix D.

become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases —

vant fact by person who is dead or cannot be found, etc., is relevant ;

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

when it is made in course of business ;

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or against interest of maker.

NOTE.—The general rule of evidence is that the best possible kind of proof available must be produced. As regards the *truth* of statements (as distinguished from the mere fact of the statement having been made), the best evidence would be the sworn testimony of those who made them, duly subjected to cross-examination. But when it happens that the maker of the statement cannot be called as a witness, the question arises whether his statement may be otherwise proved to have been made, and, if so, in what circumstances it may itself be accepted as evidence of its truth, although not made on oath or under cross-examination. Section 32 enumerates those circumstances; and it must be remembered that the statement is never *per se** admissible if the maker can be conveniently called as a witness, unless it also falls within the category of certain statements 'made under special circumstances,' which are dealt with in sections 34—38.

Why such statements, although unsworn, are admitted in evidence.

A study of the quoted parts of this highly important section 32 will show that the principle underlying it is that there is abstract probability specially in favour of the truth of the statement. Grave inconvenience would result if the particular statements in

Explanation of the principle underlying the rule.

* "In itself."

question were not expressly admitted in evidence. A case of great magnitude recently occurred in which a large series of bills submitted by a contractor were dealt with in detail by an officer conversant with the matter, and carefully noted on by him, in the discharge of his professional duty. The officer soon afterwards died, and it became highly important to prove the relevant facts noted by him. The matter went to arbitration, and the compiler of this Manual, who happened to be consulted at the last moment, was able to fortify the officer acting for Government with a reference to sub-section (2), which rendered the statements in question relevant facts, and, as such, admissible in evidence. Knowledge on the part of officers that, in the event of their not being producible as witnesses, the entries of relevant facts in their note-books, or on bills or other documents, made in the ordinary course of business may prove extremely valuable, will, it is hoped, strongly encourage them to follow the practice of making such entries. And these entries have another use. Under certain restrictions, an officer called as a witness may "refresh his memory" by referring to such memoranda. This will be explained further on under section 159 of the Act. These notes may thus afford great protection to the officer himself.

Practical value of this knowledge to officers.

Statements made under special circumstances.

Entries in books of account when relevant.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration.

A sues *B* for Rs. 1,000, and shows entries in his account books showing *B* to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence to prove the debt

Relevancy of entry in public record made in performance of duty.

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined

by the law of the country in which such book, register or record is kept, is itself a relevant fact.

36. Statements of facts in issue, or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts. Relevancy of statements in maps, charts and plans.

NOTES 1.—Statements made under the special circumstances described in sections 34—38 are always admissible, even though the persons who made them can be and are called as witnesses. It is therefore most important that all officers should grasp the fact that the special entries in question have an independent value of their own, *and should invariably be mentioned in preparing a case for opinion.* They should likewise receive their due weight when an officer has *to come to a conclusion in a case for himself.* Statements under sections 34—38 admissible *per se.*

2. The provisions of section 35 may overlap those of section 32, sub-section (2), *i.e.*, an entry may be admissible under both of these sections. A considerable number of highly relevant entries of this kind were discovered to exist when the defence in the heavy claim cited as 'the collision case' was being prepared. Not one of these entries was brought to notice by the departmental officers concerned. One critic of the draft Manual cites an excellent instance of a fraudulent addition to a rate, entered in figures only in the agreement, which was defeated by a note relevant under section 35 Statements may be doubly admissible

3. This place is as good as any other for pointing out the great importance of safely guarding documentary evidence, not merely against accidental loss or injury, but also against theft, forgery, and other criminal acts. In a case where goods were consigned, according to the goods-forwarding-note, to *Burdwan* by a mistake of the sender's agent who ought to have entered *Wadhwan*, means were resorted to, on the mistake being discovered by the sender, to abstract the forwarding-note from the book into which it had been pasted, and then a claim for damages for alleged missending was boldly advanced against the railway. In this particular instance the entry did not fall under Vast importance of *safe-guarding* documentary evidence.

section 35, but was an "admission" of great value. The principle, however, is equally applicable to official entries, and to all documentary evidence whatever. Another case could be cited where the office of an executive engineer was dishonestly plundered of several original letters from a contractor, fatal to the claim subsequently set up by him. *The very first step to be taken on the smallest indication of possible controversy is to place all documentary and other tangible evidence in safe keeping.* Indeed, as the above-quoted railway case indicates, registers or other documents embodying the terms of contracts, or proving facts material in connexion with them, should be protected *from the outset* against the possibility of foul play. There is excellent reason to believe that even some judicial records which contained documents injurious to the plaintiff in a recent false claim of great magnitude were dishonestly stripped by an unknown agent of the plaintiff, and valuable evidence for the defence was thus made away with. In another instance, a whole series of erasures and fabrications of evidence in official registers was effected by a dishonest commissariat agent prior to his detection: had the books been securely guarded at all times, these alterations could not have been made. It is needless to multiply examples in support of the proposition that all documentary and other tangible evidence should be carefully guarded against rascality as well as against accidental loss. This point is again touched upon elsewhere.

First step on likelihood of dispute

Suggestions of officers in this connexion

A good many officers have expressed concurrence with the above paragraph: none dissent from it. It is suggested that, so far as possible, executive engineers should keep very valuable documents, such as deeds of agreement, in their iron cash chests: that they should see that the doors and locks of record presses are in good order, invariably retaining the keys in their own possession: that they should keep up a full and regular list of papers in their charge, in their official note-book: and it has also been well observed that a fuller resort to registration, and to the use of copying presses, would largely enhance the

security of valuable documentary evidence. It may be added that, in the case of exceptionally important communications received from contractors, it would be a valuable precaution to have them at once copied into a special register. In the event of the originals being lost or made away with, their contents could be proved by the secondary evidence thus secured (see section 63 (3) and section 65 (*c*) of this Act, *infra*). The matter is of sufficient importance to call for authoritative orders by Government.

How much of a statement is to be proved.

39 When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers

NOTE.—It is necessary to understand the law as enacted in this section, in order to know how much of a book or of a series of letters should be deemed relevant in preparing a case for opinion. Both extremes, —the omission of material passages and unduly cumbering the case with irrelevant matter—are to be avoided; but especially the former.

The correct course to follow

Opinions of third persons when relevant.

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art or in questions as to identity of handwriting, or finger impressions, are relevant facts.

Such persons are called experts

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

Opinions of experts

46. Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Facts bearing upon opinions of experts

section 35, but was an "admission" of great value. The principle, however, is equally applicable to official entries, and to all documentary evidence whatever. Another case could be cited where the office of an executive engineer was dishonestly plundered of several original letters from a contractor, fatal to the claim subsequently set up by him. *The very first step to be taken on the smallest indication of possible controversy is to place all documentary and other tangible evidence in safe keeping.* Indeed, as the above-quoted railway case indicates, registers or other documents embodying the terms of contracts, or proving facts material in connexion with them, should be protected *from the outset* against the possibility of foul play. There is excellent reason to believe that even some judicial records which contained documents injurious to the plaintiff in a recent false claim of great magnitude were dishonestly stripped by an unknown agent of the plaintiff, and valuable evidence for the defence was thus made away with. In another instance, a whole series of erasures and fabrications of evidence in official registers was effected by a dishonest commissariat agent prior to his detection: had the books been securely guarded at all times, these alterations could not have been made. It is needless to multiply examples in support of the proposition that all documentary and other tangible evidence should be carefully guarded against rascality as well as against accidental loss. This point is again touched upon elsewhere.

First step on likelihood of dispute

Suggestions of officers in this connexion.

A good many officers have expressed concurrence with the above paragraph: none dissent from it. It is suggested that, so far as possible, executive engineers should keep very valuable documents, such as deeds of agreement, in their iron cash chests: that they should see that the doors and locks of record presses are in good order, invariably retaining the keys in their own possession: that they should keep up a full and regular list of papers in their charge, in their official note-book: and it has also been well observed that a fuller resort to registration, and to the use of copying presses, would largely enhance the

security of valuable documentary evidence. It may be added that, in the case of exceptionally important communications received from contractors, it would be a valuable precaution to have them at once copied into a special register. In the event of the originals being lost or made away with, their contents could be proved by the secondary evidence thus secured (see section 63 (3) and section 65 (*c*) of this Act, *infra*). The matter is of sufficient importance to call for authoritative orders by Government.

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NOTE —It is necessary to understand the law as enacted in this section, in order to know how much of a book or of a series of letters should be deemed relevant in preparing a case for opinion. Both extremes, —the omission of material passages and unduly cumbering the case with irrelevant matter—are to be avoided, but especially the former. The correct course to follow

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Such persons are called experts.

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant. Opinions of experts.

46. Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant. Facts bearing upon opinions of experts.

Opinion as to handwriting when relevant.

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Opinion as to existence of right or custom when relevant.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are relevant.

Explanation.—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section

Grounds of opinion when relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration

An expert may give an account of experiments performed by him for the purpose of forming his opinion

Why opinions are admitted as evidence on certain subjects.

NOTE —As a general rule, mere opinions are not relevant facts. The rule is, however, subject to certain reasonable exceptions relating to technical matters, themselves matters of opinion, to handwriting, and to questions of custom or right, which also are matters of opinion. In these cases, the opinion of persons specially skilled upon the point, or exceptionally qualified to testify as to the writing, or the custom or right is admitted, together with the grounds for that opinion. The striking experiments in the *Ardlamont* case, where the effects of shot at known distances on the human head were ascertained by actual experiments made by experts upon dead bodies, illustrates the law on this subject (section 51). Knowledge of these provisions may be very useful to officers

who find it necessary to oppose their professional opinion to the contentions of contractors.

PART II OF THE ACT.

ON PROOF.

FACTS WHICH NEED NOT BE PROVED.

CHAP. III. 56. No fact of which the Court will take judicial notice need be proved

Fact judicially noticeable need not be proved.

NOTE.—It seems unnecessary to here quote the facts enumerated in section 57 whereof the Courts will take judicial notice. They can be studied in the Act itself.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings

Facts admitted need not be proved.

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Practical utility of this section explained.

NOTE.—It would greatly simplify the statement of a case for opinion if the officer concerned and the other party could meet and utilise the above section by "agreeing" certain facts, thus narrowing the matter to the questions really in dispute. A great deal of time and expense are often wasted in the investigation and proof of facts which the opposite party could easily have admitted if asked to do so. Where the contractor or other claimant concerned is a respectable person, much can be done in this direction; but it too often happens that the antagonist of Government declines on principle to admit anything, and views even the simplest proposals of this kind with a jaundiced eye. Still, it is always worth trying to come to an understanding upon facts not seriously capable of denial, and such interviews and correspondence can do no harm if protected by being clearly declared to be "without prejudice."* Of course the

* See Chapter IX, Form No 2.

agreed-on facts, when properly reduced to writing, will be held to be duly admitted by both sides for all purposes of the case, although until such a writing has been duly signed the communications with the other side remain privileged.

OF ORAL EVIDENCE.

Proof of facts by oral evidence.

59. All facts, except the contents of documents, may be proved by oral evidence. CHAI

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the ground on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Explanation of the term "oral" evidence.

NOTE.—"Oral" evidence means evidence by word of mouth, unwritten. This explanation would be deemed needless had not the term been misunderstood by a pleader of standing within the knowledge of the compiler of this Manual. Such evidence is also called "parole evidence."

OF DOCUMENTARY EVIDENCE.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence. CHA

62. Primary evidence means the document itself produced for the inspection of the Court. Primary evidence.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration

A person is shown to have been in possession of a number of placards all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

63. Secondary evidence means and includes— Secondary evidence.

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes, which in themselves insure the accuracy of the copy and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

64. Documents must be proved by primary evidence, except in the cases hereinafter mentioned. Proof of documents by primary evidence.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:— Cases in which secondary evidence relating to documents may be given.

(*a*) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to the process of the Court, or of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily moveable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c), and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Rules as to notice to produce.

66. Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and, if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

NOTES 1. The object of printing in full sections 60—65 may be here explained. Unless officers know the sort of evidence necessary to prove particular facts, they must necessarily be at sea, not only in submitting a case for opinion and preparing evidence in support of their side, but also (what is quite as important) in their every-day disposal of business. Evidence cannot be manufactured after a dispute has arisen; it grows—or is allowed to perish irrevocably as the contract proceeds. According as the responsible officer understands or is ignorant of the main principles of evidence, and acts with or without due regard for them *from the first*, he will find himself prepared or unprepared to repel attack when a dispute arises. As each item of evidence passes day by day through his hands, an officer ought to be able to judge whether it is admissible or inadmissible proof to offer in the event of any disagreement. Whatever is admissible should be systematically preserved in its proper place. By quiet, careful observance of this practice, which is not at all a troublesome one to follow, incalculable trouble may be saved, and gaps may even be filled up which, after the lapse of time, no amount of labour could get over. A simple example of this may be given. The case is not one arising out of an ordinary contract, but it illustrates the principle upon which it is desired to here lay stress, *viz.*, that evidence should invariably be 'pigeon-holed' for future use *as it comes to hand*. A collision occurs. Officials are soon on the spot. The passengers are all accessible, ready and willing to assist. *Five minutes' work will secure a memorandum of their names and addresses.* This precaution, however, is

Object of printing sections 60—65 in full explained.

Proper method of disposing of evidence as it occurs.

Value of the practice illustrated.

not taken, and the passengers scatter to the ends of the earth. It is no exaggeration to say that not one hundred times the same amount of labour will afterwards establish the passengers' identity and addresses, even if it has not become quite impossible to discover some of them. This has occurred more than once within a single individual's experience. The case of Mulchand, mentioned repeatedly elsewhere,* affords several cogent examples of the practical utility of 'pigeon-holing' evidence, and of egregious neglect of this duty. The cards presented by him—conclusive proof of the capacity in which he had tendered—instead of being attached to the file of his case were lost, and a fierce conflict of testimony eventually raged around the point. The samples of screened and washed *kunkur* which he deposited were also lost, and the quality claimable under his agreement became a leading question in dispute. So little, indeed, did the officer responsible for the case understand either the law of contract—under which a person contracting avowedly as an agent cannot, ordinarily speaking, enforce the contract by suit in his own name—or the law of evidence which is embodied in the sections now under reference, that he saw no value whatever in the documents and samples in question, and threw them away as received.

Value of secondary evidence explained.

2 Attention is specially invited to the value of 'secondary' evidence. In many circumstances it is admissible as proof, and comes in useful precisely where the primary evidence fails. An obvious instance of the value of preserving secondary evidence is afforded by the case of a copy kept of a document delivered in original to the other side. Suppose, for example, that notice is served on a contractor warning him that his contract will stand rescinded in a certain event. If no copy be kept, and it be desired to prove the exact terms of the notice, the matter is relegated to "the uncertain test of slippery memory," unless the contractor will produce the original (which, if he wishes to contest the terms of it, he assuredly will not do). The simple precaution of keeping a

* See page 203 of this Manual, and elsewhere.

press-copy, or a duplicate mechanically produced together with the original, prevents all this trouble and risk, and establishes the fact. The great importance of invariably doing weighty business *in writing*, and invariably *keeping a copy* mechanically accurate or carefully compared and certified as correct, will be dwelt on again elsewhere.

Public documents.

74. The following documents are public documents:— Public documents.

(1) Documents forming the acts or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of the public officers, legislative, judicial, and executive, whether of British India, or of any other part of His Majesty's dominions, or of a foreign country

(2) Public records kept in British India of private documents. Private documents.

75. All other documents are private.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies. Certified copies of public documents.

Explanation.—Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies. Proof of documents by production of certified copies

NOTE.—It must be remembered that official correspondence in general is confidential, and that no private person has a right to inspect or take copies of it.* Section 76 furnishes a clear test, *viz*, "a right to inspect" the document. Registration registers are an example of public documents which any person has a right to inspect, and of which, therefore, he can Official correspondence in general is confidential.

* See rule 4, Punjab Civil Suit Rules, Appendix D

demand copies on payment of the prescribed fees. The Act provides expressly in sections 123 and 124, which are quoted further on, regarding production of official documents and giving evidence of their contents.

How the "right to inspect" is to be determined.

It has, however, been reasonably asked by one officer, how the question of any person's 'right to inspect' a particular document is to be determined. As Mr. Justice Field observes, "there is no general provision on the subject to be found in any enactment in force in British India, although there are some special provisions applicable to particular cases." Thus, there are special provisions in the Registration Act (III of 1877), the Marriage Act (XV of 1872), the Companies Act (VI of 1882), the Administrator General's Act (II of 1874), and so on. On any person's applying for inspection of a document, the proper course, if the officer in charge of it felt doubtful of his right to inspect it, would be to ask him under what law he claimed the right. If he failed to produce legislative authority, "it may," according to Mr. Justice Field, "be laid down with tolerable safety, as a rule applicable...... ......to all...........writings of a public nature, that if the disclosure of their contents would, in the opinion of the... ....head of the department under whose control they may be kept, be *injurious to the public interests*, an inspection would not be granted," and, therefore, a copy would of course not be granted either. The matter has been noted by the compiler as one of many upon which authoritative rules for future guidance should be laid down.* Another question put may be here disposed of. Every single officer of the Public Works Department is a "public officer" within the meaning of this section, and all records of the Department in his charge are "public documents."

All P. W. D. officers are "public officers."

Presumptions as to documents.

Presumption as to maps or plans made by authority of Government.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

* They have now been laid down for the Punjab. See rule 4, Civil Suit Rules, Appendix D.

NOTES.—1. Two points should be borne in mind in preparing maps or plans for the purposes of any cause: (1) that it will be necessary to distinctly prove every fact entered thereon, unless the other side will agree in writing under section 58 before the hearing to admit the accuracy of the document; (2) that no *controversial* fact should be entered on the plan, *e.g.*, in a suit regarding a right of way, such a statement as "path which the plaintiff has never used during the last three years." The compiler of this Manual has repeatedly known cases of maps and plans being rejected in evidence because improperly prepared. Maps and plans should show objective physical facts only, and neither assertions nor opinions as to other facts. Correct rules to observe in preparing plans for Court.

Advice has been asked as to the best means of avoiding absurd objections to plans in Court on the ground that they contain conventional signs,—*e.g.*, lamps,—not drawn to scale. The safest method is to insert on the face of the plan a note expressly stating that "the following signs shown on this plan are not, because they cannot be, drawn to scale," and then to enumerate these. But there is no limit to the perverted ingenuity of dishonest lawyers. In 'the collision case,' elsewhere referred to, objection was taken to the plan of a railway carriage because it did not show little traces of old, filled-up, screw-holes on the sides of a berth where once a chain, long since removed, had been fixed! The great remedy for all such ills when arising out of contracts is *to have and to utilize a workable, effective, arbitration clause in every single agreement, and thus oust the jurisdiction of the Civil Courts, and the machinations of lawyers, absolutely.* How objections to plans can be prevented. The panacea for all such troubles

2. The great importance of the accuracy of plans annexed to a conveyance is dwelt on elsewhere, and is clear from a perusal of illustration (*c*) to section 92 quoted below.* Plans annexed to conveyances.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

P. VI. 91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form Evidence of terms of contracts,

* See page 136

The sections really refer to written as well as to oral evidence outside agreements reduced to written form.

NOTES.—1. It is remarkable that this section excludes only evidence of "oral" agreements and statements between the parties, which expression, it has been explained above, means verbal, not written. But there can be no doubt whatever that, having due regard to the words of section 91, "no evidence" (whether oral or written) is admissible to prove the terms of a contract reduced to formal written shape except the formal writing itself, or to anywise modify that writing, save only as provided in the provisoes to section 92. Were this not so, it would be competent to the parties to the most elaborately drawn conveyance to go behind it and appeal to the correspondence which led up to it, and which may contain much that is in direct conflict with the covenants as finally accepted and embodied in the deed.

2. Sections 5—16 and 91—92 are probably the most important parts of the whole Act for the guidance of executive officers.

3. Provisoes (2), (3), and (4) must not, it is apprehended, be understood to mean that separate *written* agreements would *not* be admissible as much as separate *verbal* ones are. Subject to the law of registration, and so on, a subsequent agreement in writing is distinctly admissible to modify a written contract.

The true object of these rules of law explained.

4. What officers have to bear steadily in mind generally is that the express object of reducing contracts to written shape is to place beyond doubt the matters, and *all* the matters, which the parties intended to agree upon. The instrument ought not to require interpretation, and must not be interpreted by the light of previous communications, whether verbal or written. It should be complete in itself. Separate agreements, and above all oral ones, such as are referred to in provisoes (2) to (4), are much to be deprecated, as is the transaction orally of any serious legal business whatever. If, however, it turns out that some such separate agreement has been made, it is material to know that this can be proved within the limits declared by the section. Attention may here be also drawn to the particular circumstances covered by sec-

tions 95—98, in which evidence extraneous to the document is permitted.

5. It is important to observe that, under proviso (5), the parties can expressly negative all usages and customs if they wish to do so. A preposterous claim, exceeding a lakh of rupees, was recently advanced under a written contract, but it was pointed out by the compiler of this Manual that the alleged custom on which the claim rested, even if it had any existence, was repugnant to the express terms of the contract correctly understood, and therefore could not be proved.

Value of negativing inconvenient customs, etc., pointed out.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Evidence as to document unmeaning in reference to existing facts.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Evidence as to application of language which can apply to one only of several persons.

97. When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local, and provincial expressions of abbreviations and of words used in a peculiar sense.

Evidence as to meaning of illegible characters, etc.

Illustration.

A, a sculptor, agrees to sell to *B* ' all my mods.' *A* has both models and modelling tools. Evidence may be given to show which he meant to sell.

NOTE.—The cases dealt with by sections 95—98 are those of "latent" ambiguities not apparent on the face of the instrument. To be aware of these exceptions to the general prohibition of outside evidence for the purpose of explaining a document may be of great value to officers in stating a case or collecting their proofs. Section 93 (not quoted here) properly

Value of sections 95—98 to officers explained.

bars such evidence to explain *patent* ambiguities and defects in a document.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

OF THE BURDEN OF PROOF.

Court may presume existence of certain facts.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. CHAP. VII.

Clause (*g*) of special utility.

NOTE.—This section embodies a sound and useful rule of evidence likely to be of practical value in the management of official business. Clause (*g*) in particular is a safe principle to go on. It is as follows:—

> (*g*) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

ESTOPPEL.

Estoppel.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. CHAP. VIII.

Illustration.

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it

The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Reasonableness of the law of estoppel explained.

NOTE.—This provision of the law, although a highly important one, is but little understood or appreciated by many persons. It is an eminently just provision, and its existence furnishes one of the most cogent grounds for insisting that, to the utmost practicable extent, all communications with contractors should be made in writing. The fairness of the law is patent. No person who has misled another—no

matter how completely contrary to the fact the misleading statement may have been—should be allowed to repudiate his own action and disclaim responsibility for its direct results. This rule must be read as subject to the exception to section 19 of the Contract Act,* but, apart from that exception, it is absolute. It is necessary to explain that the term "intentionally," as used in the section, must be reasonably interpreted. A man's conduct may be so unequivocal that the law will declare that conduct to be conclusive evidence of "intention," whatever may as a fact have been in the mind of the doer. The proposition has been thus formulated: "If a man, whatever his real meaning may be, *so conducts himself that a reasonable man would take his conduct to mean a certain representation* of facts, and that it was a true representation and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented." This doctrine has unquestionably been accepted by our Legislature. Under section 3 of the Contract Act, a proposal is deemed to be made by any act of the proposer by which he intends to communicate such proposal, *or which has the effect* of communicating it. The principle that a man's conduct may be so clear and plain as to conclusively bind him to a given meaning, no matter what his secret and internal ideas may have been at the time, will be further discussed, in noting on the Contract Act. It is a rule of the very highest importance to executive officers. Case after case of actual occurrence could be cited, where a contractor has built up a whole claim on the basis of an alleged estoppel by conduct, *i.e.*, things alleged to have been said or done in the course of the contract by the responsible officers of Government. It is therefore exceedingly important in dealing with contractors both to employ unequivocal language, avoiding any expressions which may possibly be interpreted to imply a waiver or concession not deliberately intended, and to preserve clear proof of the language actually used.

It is embodied in section 3 of the Contract Act

Practical deduction from the law of estoppel.

* See page 68.

An example of the evil results of neglecting the above rule will be given later in Chapter VIII of this Manual.

Is a 'final bill' ever really final.

An officer asks, 'can a final bill ever be considered as final? Would it be so considered in the law Courts?' Where the Government has consented to pay a certain sum down, on the distinct understanding that such sum, being accepted in full satisfaction, shall finally discharge the Government from all further liability in the matter, the bill would most certainly be considered final by the Courts. But for such understanding, there would be no payment at all. It is a perfect example of estoppel, and proof of the circumstances under which the money was paid would be a complete answer to any further claim. The matter of 'final bills' ought, in the compiler's opinion, to be specially provided for in the 'standard conditions' alluded to further on in the Manual.

OF WITNESSES.

Evidence as to affairs of State.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. CHAP. IX.

Official communications.

124. No public officer shall be compelled to disclose com- ... official confidence when he con- ... would suffer by the disclosure.

Confidential communications with legal advisers.

... npelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Scope of sections 123, 124, 129.

NOTES—1. These three sections 123, 124, and 129, lay down the rules which are to guide officers when called upon to produce official documents or to give evidence concerning official communications.* It is not always practicable for an officer when confronted with a demand of this kind to obtain advice from the law officers as to his proper course. He must act on his own responsibility. It will be noticed that the rules

* See also rule 4, Punjab Civil Suit Rules, Appendix D.

laid down are fairly clear, but they require explanation. In fact, questions arise under them which unfortunately are too elaborate for discussion in this Manual. A few points may, however, be usefully noticed.

2. *Section 123.*—It is not easy to decide what records do, and what do not, relate "to any affairs of State." It is stated by Mr. Justice Field that "the official transactions between the heads of departments of Government and their subordinate officers are in general treated as secrets of State." He holds, too, that "communications between Collectors and Commissioners," and others between some higher officials named, "would be within the rule in India." On the other hand, the Government of India has itself ruled that the section excludes the bulk of the records of the Post Office and the like. (Letter No. 3074, dated 25th June 1890, from Government of India, Financial Department, to the Resident of Hyderabad.) It is clearly for the head of the department concerned and not for the Court to decide whether the document does "relate to affairs of State." This may be deduced from the terms of section 162, which debars the Court from inspecting any such document. It will be noticed that whenever an officer is called on to produce an official (unpublished) record, he should refer the matter to the head of his department, to give that officer the necessary opportunity of deciding as to the character of the document, and whether he will give evidence derived from it or not. Of course the ordinary rules as to primary and secondary evidence fully apply to all these sections. It must, however, be clearly understood that when production of the record itself is refused, this equally prohibits secondary evidence of its contents, or else the privilege would be a farce.

What does and what does not refer to any "affairs of State."

Who is to decide.

Proper course for officers.

Where document is privileged, no secondary evidence admissible.

3. *Section 124.*—All official communications are confidential in a sense, but this section must be reasonably understood. An officer's opinion, for example, specially submitted to his superior, or *vice versâ*, respecting a claim and with a view to the defence or settlement of it, would unquestionably come within the privilege; but a report of facts, made in the ordinary

Correct interpretation of section 124.

course of an official's duty, would not be protected from disclosure. For example, if a collision occurs, and, in the ordinary course of his duty, an official informs his superior that he found the responsible signalman drunk at his post, this report would certainly be liable to disclosure at the instance of a person claiming compensation on the basis of negligence.

The privilege is that of the *communication*.

It must be steadily borne in mind that it is the *communication* which is privileged and not the officer to whom it was made. If, therefore, such a privileged report be stolen and be actually produced in Court by the other side, the officer from whom it was stolen can object to its being put in evidence just as much as if it were still in his own possession.

True scope of section 129.

4. *Section 129.*—This is a highly important provision, invaluable to executive officers. It covers every sort of communication with the legal adviser, direct or indirect. For example, when the client requests a medical man to examine a claimant, and the medical man after the examination reports the results to the legal adviser, this report is distinctly privileged. Strenuous efforts were made in 'the collision case' already mentioned to override this just contention, but they were defeated. It may be stated generally that the privilege applies to all enquiries instituted by or under the direction or advice of professional advisers with a view to the litigation.

5. It is hoped that the above remarks may be of some little use to executive officers when they find themselves suddenly called on to produce or give copies or inspection of official documents, although it is quite impossible to supply in this Manual exhaustive instructions on this difficult subject. The compiler trusts that it may be possible ere long for Government to authoritatively consider and issue clear orders on this as on many other important matters at present in a very unsatisfactory state.*

OF THE EXAMINATION OF WITNESSES.

Former statements of witness may be proved to corroborate

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or Chap.

* This has been done to some extent for the Panjab. See rule 4, Civil Suit Rules, Appendix D.

before any authority legally competent to investigate the fact, may be proved. *later testimony as to same fact.*

NOTE.—This section shows the importance of preserving such statements and mentioning their existence to a legal adviser. For instance, in a recent case a medical officer was called on, some 14 months after the event, to prove that he had not granted permission for the removal of a patient from his hospital. His oral evidence was strongly supported by a written statement proved to have been made by him about the time of the removal, when the incident was fresh in his memory, and when no appreciable motive for his making a false statement existed. *An instance of the use of this section cited.*

158. Whenever any statement relevant under section 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested. *What matters may be proved in connection with proved statement relevant under section 32 or 33.*

NOTE.—This is a very useful provision. Entries in the note-book of a deceased officer might largely gain in value if corroborated as this section permits. Entries, again, purporting to be made in the course of business and produced by the person who made them may be cogently attacked in the same way, *e.g.*, by showing that the book contains a number of forgeries. This was done with excellent effect in a recent case, and officers who have reason to believe that statements of the sort will be proved against Government ought to give the matter their attention. *Double value of the section illustrated.*

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. *Refreshing memory.*

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: *When witness may use copy of document to refresh memory.*

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

Testimony to facts stated in document mentioned in section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure the facts were correctly recorded in the document.

These two sections show the immense value of contemporary notes.

NOTES.—1. The object of quoting sections 159 and 160 is to make plain the immense value of notes made at the time when events occur. It is a physical impossibility for any officer months or years afterwards to testify to small details on the strength of his unaided memory. Yet proof of details apparently of the most trivial kind may turn out to be of paramount importance. To take a recent instance,—'the collision case,'—it was highly important to the defence to establish the exact composition of the train from Lahore which collided, both as regards the particular carriages which composed it and their precise marshalling; also to prove the condition of every part of every carriage after the collision. The suit was not filed for a whole year after the event, and at so great an interval it would have been wholly impossible for any person to give reliable evidence on points such as these from unaided memory. But it happened that, according to rule, the composition of the train was duly noted, and the carriages were examined and reported on at the time of the collision. Now it happens, too, that these registers and reports had an independent value of their own under section 35 (the officials being public servants), and would have also been admissible in any case under section 32, clause (2), if the writers had not been producible. But they were of the greatest use, apart from these sections, as enabling the writers to refresh their memory, to swear positively and precisely to the facts stated in them, and to successfully resist cross-examination on the subject. In this instance, the notes were made in obedience to orders; but if they had been voluntarily prepared, they would have been just as valuable under section 159. Officers may rest assured that the time

A concrete case cited.

and trouble bestowed on the systematic entry of every fact of any weight in their note-books are never thrown away; on the contrary, the practice is perfectly certain to sooner or later redound to their credit. One officer furnishes an admirable instance of the truth of the above remarks,—a case in which, solely by the aid of his note-book, he was able to conclusively establish a crucial question of dates and defeat an attempt to defraud. The orders contained in the Public Works Department Code, Vol. I, Chapter IX, paragraphs 940 to 943, ought to be learnt by heart by every officer. The notes made by an executive engineer, in the case often quoted hereafter in this Manual as Jones' case, proved of inestimable value. During a long examination and cross-examination they were hardly ever out of his hands, and enabled him to demolish the flimsy structure of the plaintiffs' case with conspicuous success. It is understood that the officer in question has regularly kept these note-books ever since he entered the service (whence cogent corroboration of any one of them, provable under section 32, if he had not been producible), and the practice cannot be too earnestly recommended for general adoption. Such note-books should be put in safe custody when filled up. In 'the collision case' one witness had lost those kept by him, and the other side immediately suggested that they had been wilfully destroyed.

An excellent example of the value of well-kept note-books.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

Production of documents.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

NOTE.—It is thought expedient to quote this section in order that officers may know what to do in such a case. It must not, however, be forgotten that the section does not empower a subordinate, summoned in error to produce a document, to carry off to Court official records which are not in his own custody. The record-keeper of an office, for example, is by no means

Correct meaning of the words "possession or power" explained.

in official charge of the records, even though, physically speaking, they are in his possession. The proper course to adopt in a case of the kind would be to appear in Court without the document, and to explain that it is not in the witness' possession or power correctly understood, or to cause the Court to be informed to that effect.

CHAPTER III.

THE INDIAN CONTRACT ACT, IX OF 1872.

ABSTRACT OF THE CHAPTER.

FIRST MAIN DIVISION OF THE ACT.

OF GENERAL PRINCIPLES UNDERLYING ALL CONTRACTS.

Of the communication, acceptance, and revocation of proposals.

The following contracts need not be performed :—

Of certain relations resembling those created by contract.

Of the consequences of breach of contract.

Of Agency

Scope of the Act.

This Act embodies a great part, although not the whole, of the substantive law relating to contracts, and is the only one on the subject, save Act IV of 1882, with parts of which executive officers in general need attempt to familiarise themselves.

Principle of selection followed.

The object aimed at in making the following extracts from the Contract Act is that underlying the whole Manual, *viz.*, to include no provision which is not believed to be often needed by executive officers in the discharge of their ordinary duties. It is plain that so long as the amount of law quoted is restricted to sections of which this can be truly predicated, no officer need regard time as wasted which is spent in making himself familiar with them; on the contrary, he will thus protect himself against practical dangers, which without this knowledge he is unable to safely encounter, and is thus likely to involve the Government in serious loss and himself in discredit.

Divisions of the Act.

The following selections may be conveniently divided into two parts: first, that which deals with

the general principles underlying all contracts whatsoever: secondly, that relating in particular to certain specially important classes of contract.

As regards general principles, it is evident that unless an officer clearly understands such matters as the component parts of a contract,—in other words, what suffices in law to create one,—the persons, who can claim performance, and the time and place where, and the manner in which, performance can be claimed, he necessarily enters into contracts, and carries on his business, in the dark. It is no less important to officers to know the law as to effecting valid *modifications* of contracts once made, since almost every large contract is more or less altered in minor details in course of performance Equally indispensable is it to efficient protection of their employers' interests and their own that they should know distinctly the legal effects of non-performance, whether by themselves or by the other side, the rights thereby vested in the injured party, the measure of damages which the Courts will award, and the duties immediately incumbent on the party who alleges a breach of contract.

General principles which should be understood by all.

The above subjects exhaust the first main division of the Act; the rest of it deals *seriatim* with certain important classes of contract.

These are (1) sale of goods; (2) indemnity and guarantee; (3) bailment; (4) agency; and (5) partnership. Sound knowledge of the leading rules governing each of these branches of the law is absolutely essential to every officer whose duties require him to enter into or to administer contracts on behalf of the Government. It would, indeed, well repay officers to master the whole of Act IX of 1872 from beginning to end. The Law of Contract enters continually into the official and the private life of all persons just as the Law of Evidence does. For the sake of brevity, however, only sections of great utility will be quoted here. For the same reason, in many instances, the illustrations to quoted sections will also be omitted. This is regrettable, as these illustrations are a valuable aid to clear comprehension of the law. As, how-

Value of understanding the leading principles of chief sorts of contract.

ever, the Acts dealt with will be furnished *in extenso** in Part II of this Manual to all divisional officers, it will be possible for officers to refer at any time to the illustrations, when doubt is felt as to the meaning of a section. A good many observations which might usefully be made upon various provisions of the Contract Act will be found under their appropriate headings in Chapter VIII. It seems preferable to group them conveniently in a general chapter to dispersing them amongst comments on a particular section of Act. Some few of the most important points will be designedly touched upon in more than one place in this Manual in order to impress them firmly on the reader's mind.

SCOPE OF THE ACT.

Short title — 1. This Act may be called the Indian Contract Act, 1872. PRELIMINARY CHAPTER

Extent, Commencement. — It extends to the whole of British India, and it shall come into force on the first day of September 1872.

Enactments repealed. — The enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof; but nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act.

Subsequent Acts, etc., unaffected. — NOTES.—1. Of course the provisions of Statutes, Acts, or Regulations passed subsequently to the Contract Act are in no way affected by it.

Usages and customs of serious importance. — 2. It is most important to notice the wide extent to which usages and customs of trade are saved. So long as these usages and customs are not inconsistent with the express provisions of the Act itself, and are not expressly negatived by the parties themselves in framing their contract, the law will give effect to them as applicable to the contract. It is, however, perfectly open to individuals to negative the application of usages and customs, except in so far as the law imposes them in special cases (such as pre-emption), and so to make their contracts quite complete in themselves. At the same time it must not be forgotten that no general usage or custom, or incident of a contract,

*See at full length.

which is inconsistent with the Act itself, will be upheld. A custom, for example, which has been enforced persistently on a large railway for a long period of only paying for lost goods their value at place of despatch instead of the true measure of damages, *viz.*, their market value at place of destination on the date when they ought to have been delivered there, would never be upheld, because it is plainly inconsistent with the general rule enacted in section 73. A special incident, again, that on breach a fixed sum should be paid as damages would not be upheld, because it would offend against section 74 unless it fell within the particular cases provided for by the exception to the same section. It is very essential to clearly grasp how far the Act (*a*) silently includes, yet (*b*) leaves it open to individuals to expressly exclude, usages and customs which may make all the difference in the interpretation of a contract. It has even been remarked by an officer of long standing that the courts attach more weight to the 'custom of the division' than to the express language of the parties. If this be the case, the necessity for clearly realising what the customs in question are, and unmistakeably including or excluding them when a contract is being framed, is all the more conspicuous.

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context.— **Interpretation clause.**

(*a*) When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:

(*b*) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise:

(*c*) The person making the proposal is called the "promisor," and the person accepting the proposal is called the "promisee:"

(*d*) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promise*

to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise:

(e) Every promise and every set of promises forming the consideration for each other is an agreement:

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:

(g) An agreement not enforceable by law is said to be void:

(h) An agreement enforceable by law is a contract:

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Most important to grasp all these definitions.

NOTES.—1. Everyone of the above explanations of terms needs the closest attention. Let them once be grasped, and the true conception of the component parts of a contract is secured. The degree of ignorance which prevails on this subject amongst educated persons is surprising. A private case occurred only a few years ago in which a professional house-agent at one of the largest stations in Upper India was proved to have imagined that to constitute a contract there must not only be a proposal and an acceptance, but also an acceptance of the acceptance. The idea is, of course, absurd. To such a process there would be no end. An officer of many years' service lately alleged that he had himself committed the very same blunder, and publicly declared himself to be unaware that (the Transfer of Property Act not being in force at the place in question) an absolute and unqualified oral offer of a house, responded to by an equally explicit acceptance at the price named, constituted a valid sale.

Oral contracts legal except the law provides otherwise.

It is expedient to explain briefly in this place that, except in so far as the law expressly intervenes and rules to the contrary, persons are free to contract as they please, wholly in writing, wholly orally, or partly orally and partly in writing. In both the instances just referred to, the proposal was oral, the acceptance written. It is in all cases most necessary that officers

should accordingly consider carefully what, if any, formalities the law imposes on any particular transaction on which they wish to enter. This subject will be illustrated in detail in Chapter VIII, and it is largely in this connexion that it is necessary to introduce the Transfer of Property Act, IV of 1882, into this Manual. Had the bargains mentioned above been struck in any part of British India where that Act is in force, neither would have effected a valid sale, but only a "contract for a sale," since under a section of it, which will be quoted hereafter, no sale of immovable property exceeding Rs. 100 in value can be effected save by a registered instrument. But nowhere is absurd procedure, such as the acceptance of an acceptance, required. It is accordingly most necessary to realize the gravity attaching to the reply to a clear proposal. And it matters not what a person may *mean* by his reply: he will be conclusively bound in law by its plain legal import, on a principle which will be further explained in the notes to the next section.

2. It is to be noted that the word "promise" in this section, and throughout the Contract Act, is used in a technical sense and not as understood in common parlance. A promise is an accepted proposal and a proposal is a signification to another of willingness to do or to abstain from doing anything *with a view to obtaining the assent of that other to such act or abstinence.* It may be as well to mention that a proposal need not be addressed to any particular person. Thus, it has been held that a railway, by publishing time-tables of its trains, makes a proposal that its trains will start as advertised, which any person can accept by applying in a proper manner to be carried by it. When, however, the public are invited by advertisement to tender for a contract, this is not a proposal. It is a mere invitation to the public to propose. By the mere form of it, the person calling for such proposals obviously does not bind himself to accept the lowest or any tender; but, for additional security, it is customary to insert in the call for tenders an express stipulation to that effect, and the practice has its advantages. *It is always better to be*

Proposals may be general

Above all, be clear.

prolix and even tautological than to be ambiguous or liable to perversions by ingenious sophistry.

Necessity of consideration.

3. The subject of "consideration" is a most important one and an intelligent understanding of it is essential. Unless the case comes within one of the exceptions mentioned in section 25 of the Contract Act, an agreement without consideration is void. What then is "consideration"? It is defined in sub-clause (*d*) of this section, but it is not till we reach section 25 that it is declared that consideration is a necessary element of a binding contract. This fact is assumed in section 10. The first words in the definition to be noted are "at the desire of the promisor". If a man voluntarily blackens my boots, I can but put them on. He did so without any desire or request of mine. Under the circumstances there can be no legal agreement or contract. There may be cases in which Equity will not permit a man to take the benefit of an act voluntarily done for him without making compensation, but yet there will be no contract. The 'consideration' may, it will be noticed, be either past or future; but it must be something done voluntarily, at the desire of the person making his promise in return for it, and not something which the other party was in any case bound to do, *e.g.*, to pay a debt enforceable at law A promise to pay such a debt is no "consideration" at all. Consideration may consist of (*a*) an act, or (*b*) abstinence from doing an act, or (*c*) a promise to do, or abstain from doing, an act. The words "or promises to do or to abstain from doing something," taken together with sub-clauses (*e*) and (*f*), lay down the legal proposition that a contract can be formed by the exchange of mutual promises, each promise being the consideration for the other. The importance of understanding the meaning of 'consideration' will be seen from the reviser's remarks under section 25.

Consideration must be voluntary.

The term 'contract' has a specific meaning.

4. The reader should once for all thoroughly realize the technical sense in which the Act defines, and consistently uses, the word "contract." It invariably means an agreement which is *enforceable by law*. This expression simply means that the agreement is a valid, lawful one, which the law will uphold. The

term has no reference, of course, to the circumstances of the other party, *e g*, whether he is in a position to fulfil his agreement, although literally read it might be argued to mean this.

OF THE COMMUNICATION, ACCEPTANCE, AND REVOCATION OF PROPOSALS.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

r. I.

Communication, acceptance, and revocation of proposals.

Further remarks on the rule of "estoppel by conduct."

NOTE —This is a most valuable and sensible enactment There could not be a more explicit recognition of the grand principle of "estoppel by conduct" than is afforded by the last eight words of the section. In discussing section 115 of the Evidence Act in Chapter II, the reasons underlying the rule of estoppel have been briefly explained,* and they need not be repeated here But too much prominence cannot be given to the profoundly just proposition on which legal writers delight to dwell, that inasmuch as men cannot look into each other's hearts and discern their inmost motives and thoughts, but must judge of those motives and thoughts by external acts, it is necessary to inflexibly rule that when a man expresses himself in a plain, unambiguous way, which—as section 3 puts it—"has the effect of communicating" a definite meaning to any rational being, the former is never allowed to explain it away by saying that he "meant" something different. "Were this not so," says Mr. Justice Cunningham, "it would always be in the power of a party to a contract to evade it by alleging a mistake." Officers have therefore to consider, before issuing any communication to a contractor, not merely what they themselves intend the communication to convey, but also, and far more carefully, what that communication *would reasonably appear to a dispassionate mind to convey*.

* See page 36

Communication when complete.

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made when it comes to his knowledge.

Illustrations

(a) *A* proposes, by letter, to sell a house to *B* at a certain price

The communication of the proposal is complete when *B* receives the letter.

(b) *B* accepts *A's* proposal by a letter sent by post.

The communication of the acceptance is complete,—

As against *B*, when the letter is posted;

As against *B*, when the letter is received.

(c) *A* revokes his proposal by telegram.

The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when B receives it.

B revokes his acceptance by telegram. *B's* revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

Revocation of proposals and acceptances

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustration

A proposes, by a letter sent by post, to sell his house to *B*

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A*, but not afterwards.

6. A proposal is revoked— Revocation how made.

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.*

Practical value of understanding point of time when proposals, etc., become irrevocable.

NOTES.—1. Sections 4, 5, and 6 dealing respectively with the communication and the revocation of proposals and acceptances are best considered together. Clear understanding of them is indispensable to a knowledge of one's legal position during negotiations. It is occasionally convenient to despatch a proposal or an acceptance by post, to be revoked by telegraph if certain expectations are not fulfilled while it is in the course of transmission. These sections show under what restrictions this can legally be done. It is to be specially noted that the point of time at which the communication of a proposal or an acceptance is complete differs as between the several parties. The *moment* a written acceptance of a proposal has been *posted*, there is a complete contract binding on the proposer, although he is then, and will during transmission of the letter of acceptance continue, in ignorance of the fact. After such despatch it is too late for the proposer to withdraw his proposal. It would have been well if, in a case which happened a few years ago, the officer concerned had known the law on this point. But the *acceptor*, on the contrary, is not bound conclusively until his letter is actually received by the proposer.

* See Chapter IX, Form No. 3.

Communication when complete.

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made when it comes to his knowledge.

Illustrations.

(*a*) *A* proposes, by letter, to sell a house to *B* at a certain price

The communication of the proposal is complete when *B* receives the letter.

(*b*) *B* accepts *A's* proposal by a letter sent by post.

The communication of the acceptance is complete,—

As against *B*, when the letter is posted;

As against *B*, when the letter is received.

(*c*) *A* revokes his proposal by telegram.

The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when B receives it.

B revokes his acceptance by telegram. *B's* revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

Revocation of proposals and acceptances

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustration

A proposes, by a letter sent by post, to sell his house to *B*.

B accepts the proposal by a letter sent by post.

7. In order to convert a proposal into a promise the acceptance must— *Acceptance must be absolute.*

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.†

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal. *Acceptance by performing conditions or receiving consideration.*

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied. *Promises, express and implied.*

NOTES.—1. The above sections form a complete group. The substance of them is this, that the acceptance must be clear, but it need not be expressed in words. Conduct, as usual, is equivalent to words. As regards clearness, it is well remarked by Cunningham J. that "the least variation between the terms of the proposal and those of the acceptance will prevent the acceptance from converting the proposal into a promise. A qualified acceptance is, in fact, a new proposal." There is no limit to the number of new proposals which may thus follow each other without any agreement being reached. As soon as the last proposal of the series is accepted absolutely and unqualifiedly in a proper manner, whether by words or deeds, there is a valid promise, but not before. *Substance of these sections explained.*

2. It must not be imagined from the terms of section 9 that, in order to make a contract valid, the whole of its terms must be expressed. In a recent private case, the whole contract, so far as words went, was the simple proposal, "Will you buy my house * * * for Rs. 15,000?" and the acceptance, "Yes, I will buy your house * * * for Rs. 15,000." Now, this was a valid sale (the Transfer *The whole of the terms of contract need not be expressed.*

† See Chapter IX, Form No 4.

of Property Act not being in force at the place in question) notwithstanding the fact that numerous most material terms were left entirely unspecified. Not a word was said as to date of payment, date of delivery, the furniture and fittings, or other items. The law permits this mode of dealing, and leaves many of the details to be collected from the surrounding circumstances. As regards the persons by whom, and the time when, and place where, performance is due, sections 40—50 provide useful general rules; but as to other points not so governed, it is open to the parties to rely on usage or custom, or, failing these, to appeal to what the transaction itself suggests as the probable intention of the parties. "Merchants and traders ....leave unwritten what they take for granted in every contract." Mercantile usage fills up the gaps. At the same time, it need scarcely be added, the practice is a very objectionable one if it be carried beyond its legitimate limits. "The legitimate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties." Hence the provisions of the fifth proviso to section 92 of the Evidence Act, distinctly excluding evidence of customs repugnant to, or inconsistent with, the express terms of a contract.

True function of "usage."

OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS. CHAP. II

What agreements are contracts.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Who are competent to contract.

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Summary of the legal requisites of a 'contract.'

NOTES.—1. Chapter II of the Act furnishes officers with a complete guide (except in respect of special cases governed by such Acts as the Transfer of Property Act, the Railway Act, and so on) to the legal requisites of an agreement valid in its terms and enforceable at law. Those requisites may be thus summarised :—

(a) There must be a lawful consideration.

(b) The object must also be a lawful one.

(c) The agreement must not be one expressly declared by the Act to be void.

(d) The parties must be persons legally competent to contract; and

(e) They must give their free consent.

The special cases just referred to are further discussed in some detail in Chapter VIII, Head I, Sub-head (5).

Age of majority.

2. The age of majority is explained in Chapter VIII, Head I, Sub-head (2) (A). It varies according as the person is or is not domiciled in British India, but for ordinary purposes may be put at 18.

Agreements with minors are void.

3. The current of Indian decisions was that, as under the English Law, a minor's contract is only voidable at his option. In 1903, however, the Privy Council decided that, under the Indian Contract Act, a minor was a person incompetent to contract and that a minor's agreement is void (a). It follows that there can be no question of ratifying or repudiating such an agreement on attaining majority.

(a) L R 30 I A 114

An artful plea.

4. The compiler of this Manual has never known a civil case in which insanity was pleaded, but he has encountered the ingenious plea of total deafness, suggested as rendering negotiation and free consent impossible. By patient cross-examination the deaf man was induced to forget himself and to expose his deceit (*); but such good fortune cannot always be relied upon.

Effect of criminal conviction

5. It has been asked whether a man who is undergoing a criminal sentence is competent to contract. The mere fact of the currency of such a sentence does not disable a man from contracting. Even a conviction which involves forfeiture of the whole of a man's property (*e.g.*, waging war against the Queen) does not deprive him of his civil rights after expiry of the sentence. Thus, he might, during the last few days of its term, contract for work to be performed by him after his release. But the question is more theoretical than practical. A more useful question, and one based on an actual case in point, has been put as to the consequences of a piece-worker's arrest on a criminal charge during performance of his contract, leaving no representative capable of carrying out the work. (The contract might be one which he would not even be *entitled* to perform by a representative: see section 40 of the Contract Act, page 87 of the Manual.) This raises a very delicate question, depending on a correct application of sections 39 and 56 of this Act. The reader is requested to observe carefully note 3 to section 39 (page 87) and notes 1 and 2 to section 56 (page 93). In answering this question, the compiler *assumes that the arrest has lasted so long that performance of the contract within the stipulated period* has become impossible. Now, either the contractor has himself to thank for his arrest, *i e.*, he has brought it on himself, or he is an innocent man, arrested, through no fault of his own, on a false charge. In the former case, the matter would come under section 39: the contractor has "disabled himself" from performing his promise in its entirety: the contract is

Effect of arrest of a contractor.

(*) *In irâ veritas—the truth comes out during anger.*

therefore "*voidable*" at the choice of Government. In the latter case, on the other hand, the matter would apparently fall under section 56. Performance has become impossible,—that is to say, legally impossible, —through the innocent man's misfortune, not his fault, no doubt; but the fact remains that, as he cannot be in two places at once, his incarceration renders it impossible for him to perform his promise. This being so, the contract forthwith becomes "*void*." The practical advice arising on this peculiar contingency is that as the contract is *either* voidable or void, it is best to exercise the right given by section 39 and to declare it to be at an end. This is the simplest course. Practical advice on such a case.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense. "Consent" defined.

14. Consent is said to be free when it is not caused by— "Free consent" defined.

(1) coercion, as defined in section 15; or

(2) undue influence, as defined in section 16; or

(3) fraud, as defined in section 17; or

(4) misrepresentation, as defined in section 18; or

(5) mistake, subject to the provisions of sections 20, 21, and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement. "Coercion" defined. XLV of 1860.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

16. "Undue influence" is said to be employed in the following cases:— "Undue influence" defined.

(1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority, for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained:

(2) When a person whose mind is enfeebled by old age, illness or mental or bodily distress is so treated

as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.

"Fraud defined.

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

(1) the suggestion as to a fact of that which is not true by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract, is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech.

Illustrations.

(a) *A* sells, by auction, to *B* a horse which *A* knows to be unsound *A* says nothing to *B* about the horse's unsoundness This is not fraud in *A*.

(b) *B* is *A's* daughter, and has just come of age. Here the relation between the parties would make it *A's* duty to tell *B* if the horse is unsound.

(c) *B* says to *A*—"if you do not deny it I shall assume that the horse is sound" *A* says nothing Here *A's* silence is equivalent to speech.

(d) *A* and *B*, being traders, enter upon a contract *A* has private information of a change in prices which would affect *B's* willingness to proceed with the contract *A* is not bound to inform *B*

"Misrepresentation" defined.

18. "Misrepresentation" means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person com-

mitting it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

NOTES —1. Sections 14—22 declare in what circumstances a consent actually given is no consent in law, because it is not "free." Substance of sections 14—22.

2. As regards section 13, defining "consent," it must always be remembered that the question is not one of the thoughts of the heart, but only of the words of the mouth. This has been fully commented upon under section 3 *supra* True import of "consent."

3. It must be noted that our law is by no means identical as regards the provisions of these sections with English law, so that the reader should be on his guard against allowing any preconceived ideas or knowledge of English law to influence him. Our "coercion," for instance, is distinctly wider than the corresponding "duress" of English law. It is questionable, on the contrary, whether our definition of "fraud" is as wide as that accepted in England A still more conspicuous deviation from English law will be pointed out under the Exception to section 19 Our law differs from English law.

4. It is very important indeed that all officers should know precisely what facts would, if proved, enable a contractor to avoid his agreement. In a heavy suit frequently quoted in this Manual as 'Jones' case,' almost the entire case for the plaintiff rested on an unwarrantable attempt on his part to establish that 'misrepresentation' had been committed by Government officers It is essential to the sound management of business transactions that those conducting them shall know what they are bound, and what they are not bound, to disclose to each other, to know what each party may, and what he may not, legitimately infer from the other's silence. The special duties of buyers and sellers of immoveable property, and of lessees thereof, are enacted in Act IV of 1882, sections 55 and 108—see Chapter VII *infra*. Practical value of these sections.

Other particular cases are dealt with in like manner in other Acts.

Subsequent knowledge immaterial.

5. Facts which only come to a party's knowledge after the contract is complete are, of course, immaterial, since he could not disclose prior to the bargain what he did not then know himself.

Guilty knowledge not necessary to misrepresentation."

6. It is highly important to clearly understand that *guilty knowledge* is by no means necessarily present in 'misrepresentation'; in other words, a clear conscience is no guide at all to a person who wishes to satisfy himself as to whether he has in the legal sense 'misrepresented' facts. The question is an objective, not a subjective, one.

Voidability of agreements without free consent.

19. When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.*

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(*a*) *A*, intending to deceive *B*, falsely represents that five hundred maunds of indigo are made annually at *A's* factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

(*b*) *A*, by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A's* factory. *B* examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A's* misrepresentation.

* See Chapter IX, Form No. 5.

(c) *A* fraudulently informs *B* that *A's* estate is free from incumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage *B* may either avoid the contract or may insist on its being carried out and the mortgage-debt redeemed.

(d) *B*, having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A* Through *A's* ignorance *B* is enabled to buy the estate at an under-value The contract is voidable at the option of *A*.

(e) A is entitled to succeed to an estate at the death of *B*, *B* dies: *C*, having received intelligence of *B's* death, prevents the intelligence reaching *A*, and thus induces *A* to sell him his interest in the estate The sale is voidable at the option of *A*.

NOTES.—1. The contract, it will be observed, is not *void*, but only *voidable* where the consent was caused by coercion, etc. Where it is due to *joint* mistake of fact, on the other hand, the agreement is *void* (section 20). **Legal effect of coercion, etc., explained.**

2. Where fraud or misrepresentation caused the consent, the injured person has three courses open to him, *and it is most essential to realise that on becoming aware of the facts he has to elect forthwith what he will do.* He cannot let the agreement go on as valid and subsisting, and afterwards claim to avoid it. He can (*a*) avoid the agreement, or (*b*) if under it he was bound to do anything, he can refuse to do it, or (*c*) he can endure the injury and treat the agreement as valid, while also insisting on being put into the position in which he would have been if the representations made had been true. One of the strongest parts in the defence of Jones' case consisted of proof that, after the plaintiff was thoroughly aware of what he was pleased to describe as "misrepresentations," he adopted none of the above three courses, but distinctly led the officers of Government by his language and conduct to believe that he wholly waived all complaints. He thus induced the responsible authority to refrain from stopping the work for the future, which he had power under the contract to do, and otherwise would have done at once. Hence a complete defence, fatal to the claim, under the law of "estoppel." **Courses open to injured party. Prompt election necessary.**

3. The Exception to this section is a pronounced innovation upon, and departure from, English law, and one which, rightly understood, is as sound and **Scope and reasonableness of the Exception**

to section 19 explained.

reasonable as, to the lay mind, it appears the opposite. It must be carefully realised that the words "fraudulent within the meaning of section 17" apply only to "silence" and not to "misrepresentation." Fraud consisting of active misstatement is wholly outside this exceptional provision. The rule rests on the admirable and frequently quoted maxim, "*vigilantibus non dormientibus succurrit lex.*"* If, by the exercise of ordinary diligence, a person can discover the truth, and will not take even this moderate amount of trouble to do so, the law will not help him here. There is, however, one special case to which it is believed that the Exception would not be applied, *viz.*, where the person making (however innocently) the misrepresentation *expressly requests* the other party to accept his assurance as correct and to refrain from verifying it, and the other party for this reason does refrain. This is mentioned because the fact may often suggest a very convenient way out of a troublesome investigation, which otherwise must be held in order to make the position a legally safe one. An example will perhaps make the writer's meaning clearer. Suppose a contractor offers sleepers, incorrectly described as of a certain quality, for sale, at a place where the officer concerned can with ordinary diligence examine them for himself. The officer can say to him "I am not prepared to buy the sleepers unseen merely on the strength of your description, and it is not worth my while to spend my time on an examination of them; but if you like to expressly beg me *not* to examine them, but to take them on the faith of your description, I will do so." If the contractor does this, and thus induces the officer to buy them without making a personal examination of the sleepers, it is believed that the contractor could not afterwards rely on the Exception to this section. He would be 'equitably estopped' from so doing.

One case, to which it would not apply. The fact is of practical convenience.

Agreement void where both parties are under a

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

*" The law succours those who are watchful, not those who sleep."

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact. mistake as to matter of fact.

Illustrations

(*a*) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost Neither party was aware of the facts The agreement is void.

(*b*) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void

(*c*) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact The agreement is void.

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact. Effect of mistakes as to law.

Illustrations.

(*a*) *A* and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation the contract is not voidable

(*b*) *A* and *B* make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France . the contract is voidable

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. Contract caused by mistake of one party as to matter of fact.

NOTES.—1. These three sections form a group dealing with 'mistake.' Section 22 would perhaps have more suitably followed section 20, or even formed a part of it.

2. It is to be carefully noted that the joint mistake of fact must be as to a matter of fact *essential to the agreement* Where an attempt to avoid an agreement under colour of 'mistake' is made—and it is a favourite device—the following points must be examined :— What 'mistakes alone' will render an agreement void.

(*a*) Was the alleged mistake one of *fact* and not of *law*?

(*b*) If of fact, was it *common to both* parties ?

(c) If so, was it as to a fact *essential to the agreement*?

(d) Was it about a fact *other than the value* of the subject-matter of the agreement?

Unless all these four questions can be answered in the affirmative, the plea is bad.

A few words may be added as to these points.

As regards (a), the question, for example, whether a certain law in force in British India is or is not in force in a given part of British India is one of law, not of fact, although it may depend merely on the *fact* of a certain notification having issued or not.

As regards (b), the basis of this rule is that (to quote Mr. Justice Cunningham) "were this not so, it would always be in the power of a party to a contract to evade it by alleging a mistake." Where *both* parties have *bonâ fide* made a mistake as to an essential fact, there is obviously no reason why they should both have an agreement forced on them which they did not really intend to enter into.

As regards (c), it would plainly be absurd to invalidate, or to allow either party to evade, an agreement because both parties were under a mistake as to some matter of fact irrelevant to the agreement. Suppose, for instance, that both parties really believed, when agreeing together, that the world is flat, not round. What does this matter? Did that belief influence the consent of either? Clearly not. The plea of mistake must therefore always be carefully scrutinised under point (c).

Point (d) needs no comment. It is quite plain.

How far every one is bound to know the law.

3. Section 21 is based on the rule that every man must be conclusively deemed to know the law *of the country in which he resides.* "There is," says Chancellor Kent, "no other principle which is safe and practicable in the common intercourse of mankind." But obviously it would be unfair and unreasonable to place *foreign* laws in the same category. Therefore it is that section 21, which appears in a law of British India, declares laws "not in force in British

India" to be in the category of *facts*. This point arose in respect of a very large arbitration case.

What considerations and objects are lawful, and what not.

23. The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations of illegal 'objects' and 'considerations.'

NOTES.—1. This is a very important section. The "object" of the agreement is that which is to be done under it. In an agreement to build a bridge for Rs. 10,000, the *object* is the building of the bridge, while the *consideration* is the payment of Rs. 10,000. Unlawfulness of either object or consideration renders the agreement altogether void. It is noteworthy that the word "unlawful" is used as including what is merely "forbidden by law," which would more naturally be merely called "illegal." For examples of such "illegal" *objects*, see the Act, sections 26, 27, 28, and 30. A promise to obtain employment for another in the public service in exchange for money is an instance of illegal *consideration*, it being universally regarded as opposed to public policy.

Partly illegal promises.

2. As to a promise to do *two* things, one legal and the other illegal, see section 57 and the note upon it *infra*, page 94.

Void Agreements.

Agreements [illegible]

24. If any part of a single consi[illegible] objects, or any one or any part of any [illegible] tions for a single object, is unlawful, [illegible]

[illegible] part.

NOTES —1. This section sh[illegible] sons when contracting should be to include nothing illegal in either object or consideration of the agreement. The subject recurs under sections 57—58.

2. Sections 24—30 enumerate particular classes of void agreements; but officers are only concerned with those falling under sections 25, 28, and 29.

Agreement without consideration void unless it is in writing and registered,

25. An agreement made without consideration is void unless—

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

or is a promise to compensate for something done,

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

or is a promise to pay a debt barred by limitation law.

(3) it is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

A common mistake recording contract by tender.

NOTES.—1. The common example of an agreement without consideration is a gratuitous promise given and accepted. A mistake very commonly made is with reference to contracts based on tenders. Various Departments of Government keep and issue printed tender forms for the supply of goods. These tender forms have a blank column for rates which the tendering contractor fills in according to the rates at which he is prepared to supply the goods. Where the amount of goods is stated and the contractor agrees and is bound to deliver all the goods at a given time or times no difficulty arises. But, as very often happens, the form provides for the supply of an approximate quantity only which the contractor undertakes to supply at such times and in such quantities as he may, from time to time, be directed to supply and, at the same time, Government does not undertake to order or take any of the goods. It is a mistake to imagine that, in the latter case, a legal contract exists under which the contractor remains bound to supply the goods There is no consideration, inasmuch as Government is not bound to order the goods and made no promise to do so. The legal position in such a case is that the contractor is regarded as making a continuous

offer to supply the goods at certain rates and up to certain quantities. Or, in other words, he states the terms on which he is prepared to do business. "If you will send me orders for goods I will supply them to you for a certain period at a certain rate." It is not sufficient for the Government to say "I agree." When the contractor is *given an order to supply* a certain quantity of goods his offer is then, and only then, accepted and a valid legal contract comes into being and the contractor is bound to supply the goods ordered. If the terms of the tender allow it, the whole of the goods can be ordered at one time. Up to the time of the giving of the order the contractor is merely in the position of a man saying 'I am willing to supply the goods on such and such terms.' The contractor can withdraw from his offer, or tender, at any time except in regard to orders or requisitions already made directing him to supply goods (I. L. R. 24 Bom. 97; G. N. R. Co. *vs.* Witham, L. R. 9 C. P. 16). It probably is sometimes desirable for Government not to bind itself to take any definite quantity of goods and yet be in a position to order goods as and when required at certain fixed periods and on certain conditions fixed beforehand. When such is the case Government must offer some legal consideration to the contractor to ensure a binding contract. The Courts are not concerned with the adequacy of consideration; any legal consideration is sufficient. Bearing in mind the definition of consideration (see notes under section 2), it would be sufficient for Government to promise to forbear, or abstain, from doing something. And, if a clause were inserted to the effect that the Government bound itself to take all its requirements of a certain nature, at a certain place, up to a certain quantity from the particular contractor *and agreed not to take any of those goods from anybody else*, such a clause or promise would constitute legal consideration and the contractor would be bound to comply with all requisitions up to the specified amount. In a recent decision of the Privy Council, on an appeal from Canada, it was held that *the absence of any promise to abstain from giving the work to some other contractor* rendered the contract not binding. Though Government does

How to put such contract on a legal basis

not promise to order the goods in any event, yet it promises to abstain from obtaining its requirements from anybody else and agrees to order its requirements, if any and whatever they may be, from the contractor. Clearly Government is tied and bound to order its requirements, such as they may be, from the contractor alone, and, to that extent, there is a promise to abstain from obtaining the goods from any other person. Pollock in his edition of the Indian Contract Act (1905), page 33, says, "If however there is an undertaking on the part of *B* not to send orders for coal (or whatever the goods in question may be) to any other person than *A* during a specified time, there is a good consideration for a promise to supply such coal as *B* may order on the specified terms and up to the specified extent." This may be accepted as a correct interpretation of the law on the subject. In the Commissariat case (P. R. No. 72 of 1904) this view of the law was urged before the Chief Court and it was further urged that in that case there was an implied promise to abstain from ordering the goods from any other contractor; but, without dealing with the legal point, the Court held that, in the particular circumstances, there was no promise on the part of Government, express or implied. A clause to the effect indicated might well be introduced in the forms of the Supply and Transport Corps instead of the complicated and ineffective arrangement of 'maximum' and 'minimum' quantities now adopted to get over the difficulty.

2. No agreement made on behalf of the Government can possibly fall within clause (1).

Distinction between a promise under clause 3 and an acknowledgment under section 19 of the Limitation Act.

3. The promise under clause (3) *gives rise to a fresh* cause of action, and is thus distinguished from an acknowledgment under section 19 of the Limitation Act (see Chapter V *infra*) which *keeps an existing* cause of action *alive*. The acknowledgment must be given *before* the debt is time-barred; the promise referred to in clause (3) of this section *cannot be given until* the debt is time-barred.

Agreements in restraint

28. Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in

respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. *of legal proceedings void.*

Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. *Saving of contract to refer to arbitration dispute that may arise.*

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration. *Saving of contract to refer questions that have already arisen.*

NOTES.—1. This section demands careful attention. It shows, for example, the worthlessness of traffic rules declaring that a railway will not be liable unless claims as to damaged goods are submitted within 48 hours. (The Legislature has now dealt with this point in section 77 of the Railway Act, IX of 1890.) Even granting that such rules form part of an implied agreement between the railway and the other party, such an agreement is void for more reasons than one. *Worthlessness of illegal agreements of this kind.*

2. The two Exceptions are highly important. The first shows within what limits an arbitration clause in a contract *as to future disputes* is valid. It is to be noted that to make such a clause valid, it must not only provide for reference to arbitration it must also provide "that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred." It is a very delicate question whether an arbitration clause not providing as above, and relating only to *future* disputes, is legal. The safest course is therefore to so word the arbitration clause in Contract Deeds as to bring it unmistakably within the first Exception to section 28 of the Contract Act. It has been recently ruled (I L R 33 Cal 1169) that the following arbitration clause came within the exception and was perfectly valid "Any dispute arising out of this contract shall be referred to the arbitration of .... whose decision shall be accepted as final and binding on both parties to the *Indispensable elements of a valid agreement to arbitrate future disputes.*

contract." The reviser is of opinion that it would be safer and preferable to omit the words "accepted as." No agreement whereby a party is prevented absolutely from having recourse to a court is valid. The arbitrator may have been guilty of misconduct, or he may have exceeded his powers and the scope of the reference, and, therefore, it may become very necessary to have recourse to a Court. It is to be borne in mind that the section itself does not allude to arbitration. It merely forbids any agreement to exclude the jurisdiction of a Court and an agreement to refer does not necessarily do that. The Court would still have power to interfere for good cause and to a limited extent.

3. The second Exception proves the clear legality of agreements to refer to arbitration disputes which have already occurred. From such an agreement neither party can withdraw "unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract." These are the words of the Privy Council (*), and they are clearly embodied in section 21 of Act I of 1877 above referred to.

The usual arbitration clause discussed.

4. A number of officers have enquired whether the usual arbitration clause is not virtually a dead letter as being unenforceable in law. It is evident that widespread lack of confidence in its validity exists in the Public Works Department. The subject is one of extreme importance, for, in the compiler's opinion, by far the best way of safeguarding the legal interests of Government is to keep altogether clear of the Civil Courts, without at the same time pusillanimously giving away the rights of Government by invariably compromising the claims of contractors. One excellent suggestion has been received for the establishment of arbitrators or Courts of arbitrators, proportioned in experience to the amount in dispute. It is not expedient to attempt a detailed exposition of the subject here; but the compiler is sure that it is one

(*) 12 M. I. A., 131.

deserving of the earnest consideration of Government, in order that the best possible form of arbitration clause, and one of undoubted validity, may be decided on and issued by authority for use in future cases. When this has been done, it ought to be impressed on officers that it is their bounden duty, on the occurrence of any dispute whatever under an agreement, to promptly call on the contractor in writing to go to arbitration, at the same time doing everything incumbent on themselves, according to the terms of the contract, to give full effect to the clause and by its aid to effectually bar legal proceedings against the Government. That a perfectly enforceable condition on this subject can be devised is certain, and if sufficiently explicit instructions as to putting it into practice be issued, no officer of intelligence need ever go astray. It is a mistake to suppose that an arbitrator duly appointed can only decide questions of fact The terms of the section (Exception 1) are quite general, and undoubtedly include an award deciding questions of law as well as questions of fact.

5. The above paragraph is the view of the compiler to which great weight should be given. The reviser is, however, of opinion that outside the Presidency towns and other areas to which the Indian Arbitration Act may be extended by notification no arbitration clause can be devised which will entirely exclude the jurisdiction of a Court.

6. By the New Civil Procedure Code (Act V of 1908) an important change in the law relating to arbitration has been made. Section 18 of the second schedule of the Act is as follows :—" Where any party to any agreement to refer to arbitration or any person claiming under him institutes any suit against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such suit may at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to

Remedies on breach of agreement to refer.

arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit." And by section 22 of the same Schedule the provision in section 21 of the Specific Relief Act, 1877, *to the effect that if any person who has made a contract* to refer a controversy to arbitration and has refused to perform it, sues in respect of any subject which he has contracted to refer the existence of such contract shall bar the suit, has been repealed. The present law is a great improvement in that previously one of the parties could rush into Court before he had actually *refused* to go to arbitration and thereupon the agreement to refer to arbitration was of no effect. As the law now stands the benefit of an arbitration clause is not lost and can be given complete effect to. If the contractor in spite of an agreement to refer to arbitration goes to Court his suit can be stayed. Where no award has been made and the contractor delays or *refuses to refer to arbitration, an application can be* made to Court under section 17 of the second schedule of the Civil Procedure Code, to file the agreement in Court and, where no sufficient cause is shown to the contrary, the Court will order the agreement to be filed and will make an order of reference to the arbitrator appointed under the agreement, or, if there is no such provision and the parties cannot agree, the Court will appoint an arbitrator. Where, in accordance with the agreement, a reference has been made to an arbitrator without the intervention of a Court and an award has been given, an application can be made to Court under section 20 of the second schedule of the Civil Procedure Code to file the award in Court and, unless good cause is shown to the contrary, the Court will pronounce judgment according to the award and give a decree, and no appeal will lie from such decree, except in so far as the decree is in excess of, or not in accordance with, the award. It will, thus, be seen from the above remarks *that it is the arbitrator* who in each case makes the award and the Court merely enforces it.

The result is that on a breach of an agreement to

refer, to which the provisions of the Indian Arbitration Act do not apply, there are three remedies open to the aggrieved party :—

(a) He may sue for damages for the breach.

(b) He may have the agreement specifically performed in the manner provided by the Code of Civil Procedure; or

(c) In the event of a suit being instituted against him he may have the proceedings stayed.

Remedy (a) means a suit in Court and, apart from that, is of no practical value.

Where the Indian Arbitration Act applies the matter is governed by the Act, which is set out at length in Appendix F.

7. The following points should also be borne in mind. A man cannot be arbitrator in his own dispute. Too often the very man who has to pass work or goods is named as the arbitrator whose decision is to be final. As far as possible the arbitrator should be a superior officer and one not actually concerned with the carrying out of the contract. Secondly, it is generally considered sufficient to send the papers relating to the case to the officer named as arbitrator and for him to pass his decision after a perusal of the same. This procedure is not sufficient. The arbitrator must act as any other arbitrator. On a reference being made to him he should issue notices to both parties, giving a date for them either to submit their cases, or to appear before him. The parties must be heard, if they so desire, and be given an opportunity to summon witnesses or documents. It is advisable for the arbitrator to keep notes of the proceedings inasmuch as in the event of an adverse award it is not unusual for the procedure of the arbitrator to be attacked and he be accused of legal misconduct. Duties of an arbitrator.

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void. Agreements void for uncertainty.

Illustrations

(a) *A* agrees to sell to *B* "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended The agreement is void for uncertainty.

(*b*) A agrees to sell to *B* one hundred tons of oil of a specified description known as an article of commerce. There is no uncertainty here to make the agreement void.

(*c*) *A* who is a dealer in cocoanut-oil only agrees to sell to *B* "one hundred tons of oils." The nature of *A's* trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(*d*) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar." There is no uncertainty here to make agreement void.

(*e*) *A* agrees to *B* "one thousand maunds of rice at a price to be fixed by *C*." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(*f*) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

Certainty from the first is most important

Notes.—1. Certainly being one of the first essentials of a soundly-drawn agreement, the illustrations to section 29 are quoted. As little reliance as possible should be placed on the power to make certain afterwards the meaning intended. It is far better to express it unmistakably, instead of relying, for instance, on so dubious a guide as that in illustration (*c*).

Examples of what does *not* constitute 'uncertainty.'

2. An agreement is not "uncertain" because neither party knows the exact extent of the subject matter of it, *e.g.*, the amount of tonnage in a landslip, which after inspection it is agreed to remove for a lump sum, or the area of an estate commonly known by a description used in the agreement. Nor would a mistake of fact as to tonnage or area, even if it be common to both parties, invalidate either of these agreements, such question of fact not being "essential" to the agreement as made. This is a highly important fact in practice.

OF THE PERFORMANCE OF CONTRACTS.

Contracts which must be performed.

Obligation of parties to contracts

37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract. CHAP

NOTES.—1. The word "representatives" means 'legal representatives.' The mere fact of a person being the natural heir of a deceased contractor does not make such person legally liable to perform the promises of the deceased promisor. But if the heir accepts the inheritance,—if the executor under a will accepts the executorship,—and so on, he becomes liable to perform them. Meaning of the term "representatives."

2. According to Mr. Justice Cunningham, "a representative is answerable, when answerable at all, only to the extent of the assets of the person represented." The test of his becoming such representative is to be looked for in his conduct. If he deals with the deceased's goods whether as executor or under 'letters of administration' or otherwise, he certainly comes within the scope of the section. Alleged extent of representative's liability.

3. The test whether the particular contract is or is not put an end to by the death of the promisor is found in its nature, unless, of course, the parties have embodied their intentions in express language; and such intentions must not stipulate for the impossible. As regards the question of intention, section 40 must be studied together with section 37. "Where the skill or character or any personal qualities of the promisor are necessary to the performance of the promise, the obligation is necessarily discharged by his death." Wherever the skill or character or the personal qualities of the deceased, even if not absolutely necessary to the performance of the promise, nevertheless induced the other party to entrust the contract to him, death would render it void. Thus a contract to supply goods which have merely to be bought and delivered would not become void, since the representative could equally well perform it. A contract to paint a picture necessarily becomes void on the painter's death. Test of the result of contractor's death.

4. The Act says nothing in section 37 as to the *rights* of the legal representatives to claim to perform the contract. These are, no doubt, intended to depend on precisely the same principles as their *duties* do. The right and duty are reciprocal, both under this section and section 40. *Rights* of representatives.

Practical value of these sections explained.

5. This section aptly illustrates the practical value to executive officers of a knowledge of parts of the Act. Unless aware of the law on the point, what is an officer to do on receiving a report that a certain contractor has suddenly died? Reference to the legal adviser means weeks of delay. If either the nature of the case or the intentions of the parties show that the contract becomes void on the contractor's death, the officer will be enabled by his knowledge of the law to instantly make fresh arrangements, and perhaps to save precious time.

Status quo of work to be recorded sharp.

6. In such a case the necessity to carefully record and preserve proof of the *status quo** of the work at the time of the death, if a satisfactory settling up with the deceased contractor's representative is to be achieved, need hardly be pointed out. This is just the sort of case where photography can be usefully called in aid.

Effect of refusal to accept offer of performance.]

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:—

(1) it must be unconditional:

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do:

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

Characteristics of a valid offer.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

NOTES.—1. This section is very valuable, not only as regards the conduct of contractors towards Government, but also as to tenders made by Government to them. A contractor has no right in offering performance to make it subject to fresh stipulations not

* "Condition at the time"

included in the contract, as was lately done by the purchaser of a house, who, although bound to pay at once, offered to complete the transaction *when he could succeed in borrowing money for the purpose.* This offer was rightly rejected. On the other hand, a tender of Rs. 10,000, such as was recently made in a railway case, "*subject to the approval of the Government of India,*" is no tender at all, and was justly taken exception to on this ground. The offer must be "unconditional."

2. There is no reason why a tender may not be made "under protest." This prevents it from being cited as an admission of any liability. In a recent railway case this course was carefully followed, the letter which offered (for reasons of practical expediency) liberal compensation being specially drafted by the railway's legal adviser. The offer was rejected, and a fierce but futile attempt was made at the trial to use the offer as an admission. Tender may be made "under protest."

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.* Effect of refusal of party to perform promise wholly.

NOTES.—1. It is not every refusal or disablement which gives the promisee the right to put an end to the contract. The words are not "any part or portion of the promise" but "his promise in its entirety." These latter words are ambiguous, but have been held to apply to a case where a party to a contract refuses altogether to perform his part of it. The refusal contemplated is one affecting a vital or important part of the contract resulting in the failure of the promisee to get the substance of his bargain. There need be no difficulty if, in the agreement, it is clearly provided which terms are essential and which non-essential; which shall entitle the other party to put an end to the contract and which entitle him to compensation. Omission in the agreement in this respect may involve difficult questions for a Court. A party is entitled to rescind who fails to get the substance of his bargain.

2. It is highly important to realise that a breach of the contract by the other party does not necessarily Breach only makes contract *voidable.*

* See Chapter IX, Forms Nos. 9 and 13

put an end to it. It only *entitles* the injured party to put an end to it, and does not *compel* him to do so. He is entitled to elect whether he will (in certain cases) (*a*) enforce performance—where still possible,—or (*b*) accept performance of the residue still possible and claim damages for the part no longer possible, or (*c*) treat the default as a breach of the contract and perform the contract personally, or have the same carried out by a third party and claim damages for any loss sustained through the non-fulfilment of it, or, lastly, (*d*) put an end to the contract and, similarly, claim damages for any loss sustained by him through non-fulfilment of it.

The compiler of this Manual laid down the course to be adopted as (*a*), (*b*) and (*d*). The action suggested in (*c*) above is to meet the case of a contract to supply goods by instalments. It would appear that, if on a default regarding one instalment, the contract was rescinded, the contractor would not, in face of the rescission, be bound to supply the subsequent instalments and Government would not be able to recover losses on the subsequent instalments which the contractor was prevented from supplying and as to which no default had consequently been made.

The proper and wisest course to adopt in the event of a contractor failing to deliver an instalment of goods due from him is to notify him of his default and to inform him that similar goods to the extent of the instalment will be, or have been, bought at market rates and that he will be held responsible for any loss. As each default occurs goods should be purchased at market rates and the contractor notified. By this means Government would undoubtedly be able to recover the total loss incurred by the contractor's defaults. Even in the event of a contractor openly refusing to perform any part of his contract Government would not be in a position on any given date to go into the market and buy the whole of the goods. The market rates to be seen to are those prevailing on the various dates of default which may well vary. If the contract is rescinded on the occurrence of any one default the reviser is of opinion that no claim could be

made on account of loss arising out of defaults subsequent to the rescission. The rights of the parties upon a rescission of a contract is not however dealt with under this section. It merely states the circumstances under which a party is entitled to rescind a contract. The effect of a rescission on default is dealt with by sections 64 and 75, and this very important subject will be dealt with again under section 75.

3. *The election must be made with reasonable promptitude.*—Delay beyond a reasonable time will constitute acquiescence, and will preclude the injured party from exercising his right of rescission. As already explained in note 2 to section 19, this principle, enforced by the defence, proved fatal to a recent claim for over Rs. 50,000 against Government. Election of injured party must be prompt

4. It must be carefully noted that the section only refers to wilful refusal or wilful disabling to perform. Inability resulting from causes beyond the promisor's control is separately dealt with by section 56. *Involuntary failure falls under section 56.*

By whom contracts must be performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it. Person by whom promise is to be performed.

Illustrations

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B
re-

(*b*) *A* promises to paint a picture for *B* *A* must perform this promis personally.

(*b*) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. Effect of accepting performance from third person.

NOTES.—1. Section 40 lays down a rule of great practical importance to officers. It will be noticed that it applies both during the life and also after the Section 40 applies both during the life of con-

tractor and after his death.

death of the promisor, and shows that the notion entertained by many officers that the contractor's death necessarily puts an end to the contract is a mistaken one. Unless "the nature of the case," or the express language of the contract, shows that the intention was that the promisor *himself* should do the work, he is, and after his death his representatives are, clearly entitled to employ a *competent* person to perform it.* Thus, as already explained, the painting of a picture is peculiar to the individual, and a contract of this sort dies with him, although other painters could paint it even better than he. On the other hand, many works could be undertaken and performed exactly as well by other competent persons as by the contractor himself. In such cases the promisor or his representatives could claim, under the Contract Act, to make over performance to any such person, unless precluded, as above explained, by "the nature of the case," or by express stipulation to the contrary. This contingency should always be expressly provided for in the contract itself, which is the only sure method of avoiding doubt and disputes.

Basis of section 41.

2. Section 41 rests on the principle of 'estoppel,' which is essentially a rule of common sense.

Devolution of joint liabilities.

42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Any one of joint promisors may be compelled to perform.

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Scope of section 42 explained.

NOTES.—1. The rule enacted in section 42 is not intended to override the provisions of sections 37 and 40. "The nature of the case," as section 40 justly provides, may prove a contrary intention, no less than express words in the contract prove one. Section 42 merely alludes to the matter of *joint* liabilities, and not to the question whether any liability at all survives

* See Chapter IX, Form No. 7.

a promisor's death. These three sections might have been more harmoniously worded.

2. Section 43 is a most necessary guide to executive officers, although it is rarely expedient to give a contract to a plurality of persons. The converse question of the devolution of joint rights (*i.e.*, the question who can claim performance of a promise made to two or more persons jointly) is dealt with by section 45, which is not quoted in this chapter of the Manual. Usefulness of section 43.

3. In a very recent case, on the death of one of the co-contractors, the officer concerned refused to allow the surviving contractor to go on with the work of construction until the representatives of his deceased partner were ascertained through Court and agreed to go on with the work, though the surviving partner was willing to carry out the contract and was willing that all monies due should be retained by Government. The result was that, owing to the rains, the work was irretrievably injured and heavy damages were claimed by the contractor. Though, ordinarily, the death of a partner dissolves a partnership the partnership would still subsist for the purpose of finishing and winding up partnership, or contract work, and under section 251, the surviving partner would be competent to carry on the contract by himself. Instance of wrongful stoppage of work.

4. A surviving partner is not bound to associate with himself for that purpose the representatives of his deceased partner. The representative might be incompetent or a minor. It is true that, under section 42, Government could insist on the representatives of a deceased co-promisee fulfilling the contract, and such a power is useful where the surviving partner refuses to carry out, or is incapable of carrying out, the contract, or where it is sought to recover damages, but where the surviving partner is willing and competent to carry out the contract and does so, no question can arise of demanding performance from the representatives Section 43 provides that performance can be compelled from any one or more of joint promisors and section 251 gives a partner very wide powers. Rights of parties on the death of a co-contractor.

Case different where contractor is member of a joint Hindu family.

5. The case of a joint Hindu family firm is different from the case of ordinary partners. The former is governed, with regard to the rights of the members of such family, more by Hindu Law than by the Contract Act. The head, or managing member, of the family can, for most business purposes, be regarded as representing the family. Contracts by such family firms are usually taken in the name of the head, or managing member, for the benefit of the whole family, and it is really the family, as a whole or unit, which takes the contract, incurs the liabilities and obligations and also acquires the rights under the contract. It is important to bear this in mind, because, on the death of the managing member, no question of his representatives will arise. It will be a case of survivorship of existing partners.

Time and place for performance.

Time for performance of promise where no application is to be made and no time is specified.

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question 'what is a reasonable time' is, in each particular case, a question of fact.

NOTES.—1. This is a most valuable section, since the time for performance is often not specified. In a recent private case, the seller of a house found it necessary to rely on the law here enacted, which the buyer unscrupulously tried to evade.*

Correct rule to follow in deciding what is a 'reasonable time'

2. As regards 'what is a reasonable time,' the sound principle to follow in practice is to calculate it with due regard to all the circumstances, and then to add a little more, so as to be well on the safe side. Moderate and judicious liberality is the wise rule to observe in every phase of every class of contract so long as the matter has not passed into actual litigation. When that stage is reached, the time for leniency and concession is gone. Then they would merely be regarded as a sign of weakness.

Mode of reckoning the time.

3. "Where there is no knowledge common to both parties of an existing impediment to the performance,

* See Chapter IX, Form No. 11.

the time must be reckoned with regard to *ordinary* circumstances."

50. The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions.

Performance in manner or at time prescribed or sanctioned by promisee.

NOTES.—1. This rule is illustrated by section 41, where performance is accepted *from a third person*. The section is useful as explaining to officers their powers under contracts given by them. Another common example is where the creditor asks his debtor to pay the debt to a third person. Such payment settles the debt.

For example, see section 41.

2. It is noteworthy that the promisee is not entitled to " prescribe " payment to a third person (in other words, to assign his claim), except by strictly complying with sections 131 and 132 of the Transfer of Property Act, where that Act is in force. The matter of assignments is dealt with elsewhere.

Limited powers of 'assignment' noted.

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of failure to perform at fixed time a contract in which time is essential.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of such failure when time is not essential

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Effect of acceptance of a performance at time other than that agreed upon

NOTES.—1. This is an exceedingly useful section, of great practical value. The parties can always make time 'essential' by merely declaring it to be so when they are entering into a contract, or their intention may be sufficiently clear from 'the nature of the case.' The point should invariably be considered in giving a contract, and it is much better not to trust to inferences from the nature of the contract, but to express

How time can be made "essential" in an agreement.

promises to pay a person a large sum of money, he is liable in damages for failure to do so, notwithstanding that performance in his case was 'impossible.'

Reciprocal promise to do things legal, and also other things illegal.

57. Where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

NOTE.—Where the two sets of promises are distinct and the void part can be separated from the remainder the contract is not invalid. If, however, the two sets are one integral whole, or the parties themselves treat them as such, the whole contract is void.

Contracts which need not be performed.

Contracts superseded, rescinded or altered need not be performed.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations.

(a) *A* owes money to *B* under a contract It is agreed between *A*, *B* and *C* that *B* shall thenceforth accept *C* as his debtor instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

(b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A's*) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) *A* owes *B* 1,000 rupees under a contract. *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in his books, but *C* does not assent to the arrangement. B still owes *C* 1,000 rupees, and no new contract has been entered into

Promisee may dispense with or remit performance of promise.

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations.

(a) *A* promises to paint a picture for *B* *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B*, and *B* accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5,000 rupees *C* pays to *B* 1,000 rupees, and *B* accepts them in satisfaction of his claim on *A*. This payment is a discharge of the whole claim.

(*d*) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A*, without ascertaining the amount, gives to *B*, and *B* in satisfaction thereof accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(*e*) *A* owes *B* 2,000 rupees, and is also indebted to other creditors *A* makes an arrangement with his creditors, including *B*, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B*'s demand

NOTES.—1. With section 62 must be read Chapter VIII of the Transfer of Property Act, where that Act is in force—see Chapter VII of this Manual.

Who alone have power to modify.

2. It will be noted that only the actual parties to the contract have the power of modifying it. This is clearly reasonable. Government, under the title of the Secretary of State for India in Council and not any particular officer, should be a party to all contracts; and where this is done it is obvious that any officer of Government duly authorised and having the necessary power can rescind, modify, etc., a contract irrespective of the officer who originally made or executed the contract on behalf of Government.*

Modification must precede breach.

3. The agreement to modify the contract must be entered into *prior to any breach* thereof.

Further remarks on notes 2 and 3 above.

4. The compiler has been asked to amplify notes 2 and 3, and it has been remarked that section 62 and its illustrations are not particularly happy as regards the majority of Public Works Department contracts, for they would make it appear that the very slightest modification cancels the original contract. This observation is correct After the very smallest modification whatever has been agreed to, the contract, *as originally entered into*, has legally ceased to exist, and can never be fallen back on. But this does not mean that nothing survives except the modification. Of course so much of the original contract as is left by the parties unaltered can be enforced, but only with the new condition engrafted upon it. As suggested by the officer here quoted, a subsidiary agreement embodying the modifications is all that is required, and a simple specimen will be found as No 15 in Chapter IX. Note 3 is based on a decision of the High Court of Calcutta reported at page 319 of Volume XV, Indian Law Reports, Calcutta series,

* See Chapter IX, Form No 14, also No 16

where it is clearly laid down that the provisions of section 62 "do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to." After a breach of the original contract has been committed, the parties must, according to the above quoted ruling, start afresh and make a new agreement complete in itself, if any.

Effect of remission.

5. Section 63 of course implies that after a promisee has remitted performance, he is precluded from subsequently insisting on performance.

Consequences of rescission of voidable contract.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Rights and liabilities of contractor on rescission of contract.

NOTE.—1. It is material to officers to clearly understand that when they rightfully rescind a contract on account of the contractor's breaking the conditions of it, they are by no means entitled to turn him out like a dismissed servant without his wages. The contractor is entitled to be paid for all work done by him under the contract. On the other hand, such a contractor would be liable in damages for his breach of contract. (See section 75 *infra*, page 106.) This seems a suitable place at which to answer the question 'when, owing to breach of contract, the cost of completing a work is greater than the value at contract rates, can the excess expenditure be deducted from sums due to the contractor, or must all such sums be paid, and then a civil suit be instituted against him to recover damages?' The question is one under the law of 'set off,' elsewhere alluded to (page 263), and may be answered thus, that so long as the contractor's other transactions alluded to are between himself and the Government *in the same character* (not diverse capacities, *e.g.*, that of *principal* in one transaction; and *agent* in another), it is legal to refuse payment on account of one transaction, so as to square the account of another; and if the contractor sues as to the one debt, his cross-liability in the other matter can be pleaded as a set off. But the point is one which would

be well provided for among other "standard conditions" described further on. It has further to be remembered that the "set off" allowed by order 8, rule 6 of the Code of Civil Procedure, relates to an *ascertained* sum. The amount must be ascertained and not, for example, a claim by way of damages, the amount of which the Court must determine. On the other hand, where the cross-claim *arises out of the same transaction* it can still be legally withheld and can be pleaded as a "set off" in a suit even though the amount is not ascertained. Such a "set off" is called "*an equitable set off*" and is not dealt with in the Code of Civil Procedure at all, order 8, rule 6 of that Code not being exhaustive.

It would simplify matters and prove of great value if all contracts contained a clause specially giving Government the power to retain and *set off* all claims against a contractor whether arising out of the particular contract or out of any other transactions or contracts whatever.

2. The particular case of master and servant is an exception to the above rule, according to a general usage such as is saved by the first section of the Act. Case of servant an exception.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal. Mode of communicating or revoking rescission of voidable contract.

Section 66 seems to follow section 64 more suitably than section 65, which is on a distinct subject.

65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. Obligation of person who has received advantage under void agreement, or contract that becomes void.

This section relates to cases in which the contract is void by reason of mistake, or impossibility, or in consequence of the want, or failure, of consideration If it related to a case in which a contract becomes void owing to a rescission there would seem to be no necessity for the second part of section 64.

Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

72. A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Chap. V

Illustration.

A and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays 100 rupees over again to *C* *C* is bound to repay the amount to *B*

Mistakes of law are not excused.

NOTES.—1. Officers must not imagine that this section will help them if they make erroneous payments under a mistake of law. It cannot be supposed that the Legislature intended to upset so universally established a rule of law by words such as these. The one illustration given as to mistake relates exclusively to a mistake of *fact*.

Accidental over-payment is not an 'estoppel.'

2. It has been asked whether the fact of a contractor's over-paying his sub-contractor on the strength of an accidental over-payment to himself by Government (due to a mistake of fact) precludes the Government from subsequently claiming a right to correct the mistake. The reply is in the negative. The essence of "estoppel" is *intention*, actual or legal, and on the facts assumed there was no intention on the Government's part to induce the contractor to act to his prejudice. He ought to have checked the amount received from Government before acting on it as correct. But in all bills the usual mercantile practice should be followed, by entry thereon of the note "E. and O. E.,"—"errors and omissions excepted." The contractor, in his turn, has a legal right under this section to recover the over-payment accidentally made by himself. In like manner it may be explained (in reply to another question) that accidental over-payment in one "running bill" by no means entitles the contractor to the same excessive rate in the final bill On the contrary, the previous error can and should be corrected in the final adjustment of accounts.

OF THE CONSEQUENCES OF BREACH OF CONTRACT.

HAP VI.. 73. When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. *Compensation for loss or damage caused by breach of contract.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract. *Compensation for failure to discharge obligation resembling those creat by contract*

Explanation —In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations.

(*a*) *A* contracts to sell and deliver 50 maunds of saltpetre to *B* at a certain price to be paid on delivery *A* breaks his promise *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered

(*b*) *A* hires *B*'s ship to go to Bombay, and there take on board on the first of January a ca[illegible] it to Calcutta, the freight to be paic [illegible] Bombay, but *A* has opportunities of [illegible] argo upon terms as advantageous as [illegible] ship *A* avails himself of those opportunities, but is put to trouble and expense in doing so *A* is entitled to receive compensation from *B* in respect of such trouble and expense

(*c*) *A* contracts to buy of *B* at a stated price 50 maunds of rice, no time being fixed for delivery *A* afterwards informs *B* that he will not accept the rice if tendered to him *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it

(*d*) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise

(*e*) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to [illegible] ay The boat, owing [illegible] pointed, whereby the [illegible] time when it would [illegible] contract After that [illegible] e falls The measure [illegible] ce between the price [illegible] at the time when it [illegible] market price at the

(f) *A* contracts to repair *B*'s house in a certain manner, and receives payment in advance *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price *A* breaks his promise He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron *B* wrongfully refuses to receive the iron *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

(i) *A* delivers to *B*, a common carrier, a machine to be conveyed without delay to *A*'s mill, informing *B* that his mill is stopped for want of the machine *B* unreasonably delays the delivery of the machine, and *A* in consequence loses a profitable contract with the Government *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract

(j) *A*, having contracted with *B* to supply *B* with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the [illegible]

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and in consequence of this *B* is obliged to procure another at higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder, contracts to erect and finish a house by the first of Janu [illegible] whom *B* ha [illegible] and *C*. *A* b [illegible] down and [illegible] ne was to h [illegible] or the breach of his contract *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.

(m) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation *B* is entitled to be reimbursed this sum by *A*

(n) *A* contracts to pay a sum of money to *B* on a day specified *A* does not pay the money on that day. *B*, in consequence of not receiving the money on that day, is unable to pay his debts and is totally ruined *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment

(o) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January at a certain price *B* afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise In estimating the compensation

payable by *A* to *B*, the market price of the first of January, and not the profit which would have arisen to *B* from the sale to *C*, is to be taken into account

(*p*) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day *A* knows nothing of *B's* mode of conducting his business *A* breaks his promise and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mill

(*q*) *A* contracts to sell and deliver to *B* on the first of January certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from *A*, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture

(*r*) *A*, a ship owner, contracts with *B* to convey him from Calcutta to Sydney in *A's* ship, sailing on the first of January, and *B* pays to *A*, by way of deposit, one half of his passage money. The ship does not sail on the first of January, and *B*, after being in consequence detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel and, in consequence, arriving too late in Sydney, loses a sum of money *A* is liable to repay to *B* his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late

NOTES.—1. Section 73 is one of the most important sections in the whole Act, and, unfortunately, one of the most difficult of all to thoroughly master. For this reason, the whole of the illustrations have been printed; and it is hoped that officers will not grudge the trouble of studying them. The blunders on this subject which have frequently been committed within the personal experience of the compiler of this Manual are painful to contemplate. Take illustration (*c*), for instance. A man refused to accept ten tons of 'small coal' which he had bought from a certain railway. Instead of selling the coal at once and claiming the difference between the contract price (Rs. 50) and the price realised by the sale—say, a difference of Rs. 15 or Rs. 20 at most—the railway left the coal in the wagons for a long period, and then wished a suit to be filed for some Rs. 375 demurrage! Had the officer in question been acquainted with section 73 of this Act, he never would have made so preposterous a request. Special value of section 73 illustrated.

2. Illustrations (*a*), (*b*), and (*c*) and others aptly explain what is meant by such loss or damage as 'naturally arises in the usual course of things from the breach.' Illustrations (*i*), (*j*), and (*l*) are good examples 'Natural' and 'remote' loss or damage.

not the rescission but the breach by the other party which entitles you to obtain compensation. In such a case treat the contract as existing, though broken by the other party, and avail yourself of the remedies open to you and sue for compensation if necessary. See the remarks under section 75.

74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved, to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.

Title to compensation for breach of contract in which a sum is named as payable in case of breach.

EXCEPTION.—When any person enters into any bail-bond, recognisance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

NOTES —1. This section rests on the just aversion of the Courts to enforce 'penal' damages. The rashness of individuals leads them to agree to very unreasonable penalties, because they over-confidently hope and expect that all will go smoothly and the penalty will never be incurred. The practical moral for officers is that, unless the contract comes within the exception to the section, *it is much better not to specify* the amount to be paid in case of a breach. 'Reasonable compensation' will be claimable in any case, and there is no advantage in limiting its maximum amount; on the contrary, it may prove very inconvenient to have done so. A good many enquiries have been made as to what are "reasonable" damages—whether the mere fact of deductions being made from monthly bills constitutes these sums "reasonable" damages—and so on. The compiler regrets that the space at his command precludes him from discussing this complicated subject in the Manual. Should the detailed commentary on, and explanation of, the pres-

True basis of section 74 explained.

Practical moral for officers.

cribed forms, which many officers have suggested, be hereafter undertaken, the question of damages ought then to be most carefully explained. Meanwhile, the compiler would earnestly advise officers to study the illustrations to section 73, which have been quoted in full expressly on account of the great importance of this subject. An example has been asked for of compensation *which is awardable under this section without* proof of actual damage or loss. So-called "fines" for late delivery are an instance. Late deliveries amount to petty breaches of the contract but undoubtedly cause inconvenience and loss of time to those concerned with taking delivery. It is undesirable, and still more inconvenient, to go to Court for redress in the way of damages and compensation. For *such breaches* it is advisable to specify the amount to be paid as compensation merely for the inconvenience and loss of time occasioned. Any such clause should however make it clear that such compensation is only on account of the inconvenience and loss of time occasioned and is apart, and without prejudice, to any right to compensation for loss occasioned or to any other remedy or cause of action arising out of the breach. It is practically impossible for Government to allocate actual loss to a commissariat contractor's failure to deliver supplies by a specified day and hour: yet it is only just that some compensation should be claimable from him.

Example of compensation awardable under section 74.

Scope of the Exception discussed.

2. The Exception has given rise to some difference of legal opinion. Can private persons by their mere declaration that a certain matter is an act 'in which the public are *interested' bring within the* Exception an act of no real interest to the public? Until the Courts rule to the contrary, there is no harm in inserting a clause of the kind. Some Commissariat Department forms contain one. The effect of this clause, if valid, is that upon a breach of the condition of the bond the person in fault is liable to pay the whole sum mentioned in it, whether it exceeds 'reasonable compensation' or not. The same rule of course applies to bonds for the performance of duties or acts in which the public really are interested, even without the in-

sertion therein of any declaratory clause on the subject. One officer remarks that he would have supposed that any contract with Government for work or supplies would come within the Exception. But the Explanation to the section should have prevented such a misconception. As usual, the best solution of doubts and difficulties on the point is to provide expressly in the agreement that the public "shall be deemed to be interested" in the contract. If a contract be given *expressly* in consideration of the contractor's agreeing to that view of it, it seems just, under the law of estoppel, that he ought not to be allowed to afterwards dispute the fact so agreed to. Such public interest is, after all, a question of proof, and there can be no better proof between the parties than an express and formal declaration by the contractor himself, by means of which alone he has induced the Government to give him the contract.(*) Another officer nemarks that the Manual ought to explain how to *enforce* a penalty. He observes that "when a bond is drawn up, even on legal advice, it is found impossible in practice to recover the amount." The compiler understands this to mean "impossible to induce the Courts to decree the amount." The Courts are bound to decide according to law, and the compiler is perfectly confident that at least one tribunal—the Judicial Committee of the Privy Council—may be relied on with certainty to decide both correctly on the facts and justly on the law If the Government stops short of that Court, when the amount at stake or the legal features of the case entitled it to appeal, and sits down under unjust and erroneous decisions against it in the local Courts, it is not logical to say that sound and legal contracts "cannot be enforced in practice." However, if the earnest advice of the compiler be accepted, and steps

Best solution of the matter.

Remarks as to enforcement of penalties.

Real remedy is to keep out of Court entirely.

(*) The reviser is, however, of opinion that the exception does not relate [illegible]

equitable to do so.

be taken by Government to make an enforceable arbitration clause an integral part of every agreement and to absolutely insist on effect being given to that clause, any difficulty heretofore experienced in the Civil Courts will disappear.

Party rightfully rescinding contract entitled to compensation.

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non fulfilment of the contract.

Illustration.

A, a sin [illegible] eatre, to sing at his theatre for [illegible] two months, and *B* engages to p [illegible] On the sixth night *A* wilfully a [illegible] consequence, rescinds the contract *B* is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract

Non-utilization of this section pointed out and deprecated.

NOTE.—This section is not free from difficulty. Where the time for performance has elapsed and the loss has accrued prior to the rescission no difficulty arises. In cases, for example, of delivery of goods in certain quantities monthly for a period of twelve months, default may occur in the second month entitling the promisee to rescind the contract. If the party entitled to rescind—rescinds at once is he entitled to compensation for loss only for the default of the second month, or is he entitled to recover compensation for loss on the deliveries due from the second to the twelfth month inclusive, *i e*, for all loss on the contract. On this very important point the commentators on the Act are strangely silent. The compiler of this Manual, too, ignored it and seems to have assumed that compensation could be claimed for all loss. The wording of the section is wide enough to support either construction. *It does not indicate when the rescission* referred to occurred. The illustration seems to indicate that loss occasioned subsequent to the rescission may be claimed. This view is opposed to the English law, and Justices Chatterji and Anderson in the Commissariat case reported in the Punjab Record as No. 72 of 1901 expressly doubted whether it was ever intended by this section to depart from the English law on the subject. The subject is of sufficient importance to quote the words of the Court which are as follows:—"Defendant's counsel also contended

that under section 75 of the Contract Act when a promisee avails himself of his right to rescind a contract on account of failure of the promisor to perform any part of the contract, he thereby dispenses with future performance and cannot claim damages for non-performance of the rest of the contract. We think there is great force in this argument and the language of section 75 also does not appear to afford grounds for claiming prospective damages on the assumption of breach when there is no breach." The Court held it was unnecessary to pursue the discussion further owing to the appeal being accepted and disposed of on other grounds.

What the Court meant by the words "when there is no breach" is that there had been no breach by the contractor with respect to the subsequent instalments. If the contractor actually *refuses* to perform the contract the position is different from a mere failure to make delivery of an instalment and, in such a case, the whole contract can be rescinded and compensation can be rightly claimed for the loss occasioned. The refusal to perform may be announced before the time for performance has come, or after performance has begun. See the notes under section 39 where this matter is fully dealt with.

Section 75 cannot be properly understood without a reference to sections 39, 53 and 55. These latter sections indicate the circumstances under which a party to a contract may rightly rescind the contract and then follows section 75 which provides for the consequences of a rightful rescission. The illustration to section 75 is not a particularly happy one. It is the same illustration as that to section 39 and, apparently, the circumstances were such that, owing to the default, the contract could not be performed in its entirety.

It should also be borne in mind, with reference to section 39, that it is not every breach, or refusal, which entitles the other party to rescind the contract. It has to be such a breach, or refusal, as goes to the root,

or essence, of the contract and in such a manner as substantially to deprive the other party of the consideration for which he bargained. And, although it might be argued that whenever a party fails to carry out his part in some particular, however small, he has disabled himself from performing his promise *in its entirety*, it has been held that the breach, or refusal, contemplated is one affecting a vital or important part of the contract as above stated. See the Notes under section 39.

Failure to perform a promise to do work (for example, construction of a house, or a bridge, or earth work for a railway or canal), would in most cases come under sections 75 and 55. Time having been made the essence of the contract, it would be immaterial whether the rescission occurred after the lapse of the specified time or at some time previously when it became obvious that the work could not be completed in the specified time. The contractor might, in the latter case, contest the point, and assert that he could have completed the work in time and it is necessary that there should be no doubt that the contractor could not complete the work in the specified time. See the notes under section 55.

As regards Government and its defaulting contractors, this section is virtually a dead-letter. During seventeen years' experience as a legal adviser of Government, the compiler of this Manual has never known a single case where, upon the rightful rescission of a contract by Government, the officer rescinding it has recommended a suit to recover compensation from the defaulting contractor, although scores of cases could be cited in which substantial damages were indisputably due to Government. There are two ways of putting a stop to the endless series of unfounded claims at present instituted against Government: first, to make contractors understand that the maker of a false claim may be punished, after his suit has been dismissed, by a counter-claim to compensation for non-fulfilment of his contract; secondly, to habitually prosecute such

contractors under the Penal Code for bringing a false claim, or for giving false evidence, when the proved facts of the case render a successful prosecution certain.

The public should no more bear the loss resulting from contractors' non-fulfilment of their contracts than submit to the false claims so commonly instituted by them when these contracts are justly rescinded. One or two sharp examples would afford the dishonest contractor a most salutary lesson. At the same time, it is very necessary to point out that under no circumstances should retaliatory measures be resorted to unless success is virtually assured. Where, for example, a contractor has sued Government for damages on rescission of his contract, and his suit has been scornfully dismissed, and the highest local Court of appeal [illegible]ly upheld the dismissal of the suit, it [illegible] since the rescission is proved to have [illegible] the Government must be entitled to, [illegible]ight to claim, compensation for the con[illegible] to carry out his undertaking. But [illegible]arest possible cases is aggressive action [illegible] it is an axiom that the Government [illegible] expose itself to appreciable risk of [illegible]t, or of [illegible] do any [illegible] privat[illegible] warn[illegible]ords ma[illegible] to the [illegible]di* where it is desired to 'carry the war into the enemy's country.' There are two distinct methods. One is to report the case under the ordinary 'civil suit rules' with the recommendation that a suit for damages may be instituted. Such a case is very easy to state. By his agreement the contractor was bound to execute a certain work on certain conditions. He failed in a certain respect to do so; and this failure has involved the Government in a certain loss (stating it clearly), *notwithstanding that every reasonable effort has been made to minimize the inconvenience*, proof of which efforts must be submitted with the report (see the important Explanation to section 73):

Only in the clearest cases is aggressive action expedient.

Two modes of retaliating on contractor explained.

* "Method of operating"

and it is recommended that a suit be filed against the contractor for the said amount of loss. In submitting this report, Head IV of Chapter VIII should be attentively studied. The other resource is to prosecute the contractor criminally under section 209 of the Penal Code for having dishonestly made in a Court of Justice a claim which he knew to be false. Of course no such prosecution should be instituted except under express orders of Government; and it may be well to point out that this course is only justifiable in exceptional circumstances. "It is essential to prove that the claim made is one which the plaintiff knows to be false: it is not sufficient to show that the claim is one which he believes or has reason to believe to be false, or does not believe to be a true claim" (Punjab Record, No. 38 Criminal of 1888). In practice, the charge must relate to a claim false as to a question of *fact*, clearly within the contractor's knowledge.

Breach of part of a contract deprives breaker of right to perform any part of the contract.

In reply to another enquiry, it may be added that it is clearly not competent to a contractor, who has broken his contract in an essential particular,—such breach not having been waived or condoned,—to insist on going on with any portion of it: *e.g.*, for a man who contracted to build a bridge and who has wilfully abandoned the constructive work, to insist on going on burning 'surkhi,' etc., for the bridge and being paid for such materials. Breach of any essential part of the contract renders it 'voidable' as a whole by the other party.

SALE OF GOODS.

CHAP. V

NOTE.—*The general principles on which all contracts are based* have now been disposed of. The remaining five chapters of this Act deal with *five important classes* of contracts, namely, those relating to Sale of Goods, Indemnity and Guarantee, Bailment, Agency, and Partnership. All these five classes of contract come into the daily work of executive officers. The portions of Chapters VII—XI of the Contract Act, printed here, are of course very incomplete, but, as usual, the principle of excluding all save sec-

tions of constant utility has been followed, and the notes upon those included will be as brief as possible.

Title.

108 No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases:— Title conveyed by seller of goods to buyer.

NOTES.—1. It is unnecessary to print the three exceptions at length. They refer to (*a*) persons *holding possession* of goods, or *documents showing title to* them, (*b*) *a joint-owner in sole possession by permission* of his co-owners, and (*c*) the *bonâ fide* purchase of goods held by the seller under a contract *voidable as against the seller* In these cases, a purchase holds good notwithstanding a defect in the seller's right to sell the goods. Substance of the three exceptions.

2. The important thing for officers to realize is that, broadly speaking, they must make certain that a person willing to sell goods to Government is really the owner of those goods or his authorised agent. This point is of practical moment in the purchase of animals or other things liable to be stolen. The law applies precisely as much to Government as to any private purchaser. The important fact to realize.

3. A question of moment concerning royalty claims is put by one officer. Suppose, he says, that a contractor undertakes the supply of ballast or stone to a railway and obtains it from a quarry belonging to a third party, and that the third party comes in afterwards and claims royalty on the material, what is the railway to do? The answer is clear. If the contractor had the right of quarrying and removing the material subject simply to payment of a royalty, the owner of the quarry should be told to claim his money from the contractor. If on the other hand the contractor has simply misappropriated the material, he has given the railway no title, and the owner has the legal right to follow his property into the hands of the railway and to claim either restoration of or compensation for it: it is a case under section 108. The practical moral deducible from this useful enquiry is As to royalty claims.

that, unless an officer is certain of the contractor's right to sell the material, he should either take steps before contracting to verify that right or else exact sound security against any future claims of the sort in question. There is one very effective way—when once it has become generally understood—of persuading contractors to give true information. It was suggested by the compiler some years ago and adopted by Government, when the Value Payable Parcel Post was being abused by swindlers who sent worthless parcels 'on spec,' unsolicited, *viz.*, that the sender should be required to sign a declaration informing the Postmaster that he was sending the parcel in response to a *bonâ fide* order for the contents. To give information to any public servant which the giver knows or believes to be false, intending or knowing it to be likely that he will thereby cause such public servant to do anything which he ought not to do if the truth were known to him, is punishable with six months' imprisonment. Obviously an officer ought not to pay away Government money to a man who has no title to the goods which he offers, and never would do so if he knew the truth. The person offering them is bound to know this; and if when questioned as to his title he answers in a way which he knows or believes to be false, he can be convicted under section 182 of the Penal Code. Intelligent use of this legal fact will enable officers to keep fairly clear of the pitfall under reference and also of many others.

A sure and effective way of persuading contractors to answer truly.

Warranty.

Warranty of bulk implied on sale of goods by sample.

112. On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample.

Sale by sample is indivisible.

NOTES.—1. It is most necessary that officers should understand clearly that a sale by sample is *indivisible:* that is to say, the buyer can reject the whole if any part is not equal in quality to the sample, or he can accept the whole with certain alternative rights clearly set out in section 118; but he can *not* pick and choose, accepting part and rejecting part.

This last course is just what a subordinate Court ruled in a recent case that the officer concerned was bound to do; but this erroneous decree was set aside.

Several officers have remarked that the law as above explained is inconvenient from an Executive Engineer's point of view, "who wants good material, and would like to accept the good and reject the bad, paying only for the accepted portion." This is a mere matter of special agreement. The rule of law is only applicable in the absence of an express condition to the contrary. There is nothing illegal, so far as the compiler is aware, in a person's conceding to another the right to select so much only of "the bulk" as in the latter's opinion—or in that of any third person appointed as referee—comes up to a prescribed standard, whether that standard be by sample or by specification. Another practical method of getting over the difficulty of partial inferiority of "the bulk" is to offer the contractor a lower rate for the whole quantity. This plan is stated to be in accordance with a Bombay Government Resolution No. 522-A.—1898 of 5th December 1892, and appears to be quite unobjectionable

How the law as stated above can be fitted in with the convenience of executive officers.

Another officer puts the case of a contract for 10 lakhs of bricks to sample, and (justly enough) perceives a difficulty about accepting any until the whole 10 lakhs are ready, or commencing the work, without committing the Government to accept even inferior bricks in subsequent deliveries. The correct reply is that the contract ought to expressly provide that the bricks shall be delivered in 10 separate lots of one lakh each, every lot to be up to the sample, and each lot to be accepted or rejected as up to sample or not, independently of the rest. In fact, as the officer in question puts it, it is in effect necessary to give a number of distinct contracts, say ten for a lakh a piece. It is quite possible to do this by a single deed of agreement, which is merely a convenient *evidence* of what is agreed upon.

How to arrange in the case of a series of deliveries.

2. It ought to be unnecessary to point out the obvious importance of carefully retaining and mark-

Samples to be carefully kept.

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How to arrange in the case of a series of deliveries.

2. It ought to be unnecessary to point out the obvious importance of carefully retaining and mark-

Samples to be carefully kept

ing for identification the sample supplied; but unfortunately the point is constantly overlooked.

Same rule applies to sales by specification.

3. It has been asked whether the rule laid down in this section applies to goods sold by specification as well as to those sold by sample. In the compiler's opinion, the same rule applies. As Mr. Justice Cunningham puts it: "This and the following sections (113, 114, 115) apply to the sale of unascertained goods by description............The fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract, and this undertaking is an absolute one." If (as is further asked) a part of the goods has been delivered and actually used, before the last portion, which does not come up to specification, is tendered, the impossibility of returning the first portion does not affect the right to reject the remainder. On such rejection, the contract becomes void, and section 65 (*supra*) entitles the contractor to payment at the contract rate for so much material as had been accepted and cannot be returned to him. But if it be still possible to return all that had been taken over, then "the bulk" must be accepted, or rejected, in its entirety, unless other terms be accepted for it by the contractor, in modification of the contract as originally made.

Buyer's right on breach of warranty.

117. Where a specific article, sold with a warranty, has been delivered and accepted, and the warranty is broken, the sale is not thereby rendered voidable: but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty.

Illustrations

A sells and delivers to *B* a horse warranted sound. The horse proves to have been unsound at the time of sale. The sale is not thereby rendered voidable, but *B* is entitled to compensation from *A* for loss caused by the unsoundness.

Right of buyer on breach of warranty in respect of goods not ascertained.

118. Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may accept the goods or refuse to accept the goods when tendered,

or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them: provided that during such time he exercises no other act of

ownership over them than is necessary for the purpose of examination and trial.

In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty; but, if he accepts the goods and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty.

Illustrations.

(*a*) *A* agrees to sell and, without application on *B's* part, deliver to *B* 200 bales of unascertained cotton by sample Cotton not in accordance with sample is delivered to *B* *B* may return it if he has not kept it longer than a reasonable time for the purpose of examination.

(*b*) *B* agrees to buy of *A* twenty five sacks of flour by sample. The flour is delivered to *B*, who pays the price *B*, upon examination, finds it not equal to sample; *B* afterwards uses two sacks, and sells one He cannot now rescind the contract and recover the price, but he is entitled to compensation from *A* for any loss caused by the breach of warranty.

(*c*) *B* makes two pairs of shoes for *A* by *A's* order When the shoes are delivered, they do not fit *A*. *A* keeps both pairs for a day He wears one pair for a short time in the house, and takes a long walk out of doors in the other pair. He may refuse to accept the first pair, but not the second But he may recover compensation for any loss sustained by the defect of the second pair.

NOTES.—1. The reader will observe that there is an essential distinction as to the results of breach of warranty between "specific" articles, such as a horse, a picture, a machine actually set apart as the one offered for sale, and "unascertained" goods or goods not yet in existence at the time of the sale. Distinction pointed out.

2. A short form of notice suitable under section 118 will be found in Chapter IX, No. 17.*

OF INDEMNITY AND GUARANTEE.

126. A "contract of guarantee" is a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written. "Contract of guarantee," "surety," "principal debtor," and "creditor."

127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. Consideration for guarantee

Illustrations

(*a*) *B* requests *A* to sell and deliver to him goods on credit *A* agrees to do so, provided *C* will guarantee the payment of the price of the goods *C*

* *See* also Forms 18 and 19.

promises to guarantee the payment in consideration of *A's* promise to deliver the goods. This is a sufficient consideration for *C's* promise.

(*b*) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year, and promises that, if he does so, *C* will pay for them in default of payment by *B* *A* agrees to forbear as requested. This is a sufficient consideration for *C's* promise

(*c*) *A* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. The agreement is void.

Surety's liability

128. The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract.

Discharge of surety by variance in terms of contract

133. Any variance made without the surety's consent in the terms of the contract between the principal and the creditor discharges the surety as to transactions subsequent to the variance

Discharge of surety by release or discharge of principal debtor

134. The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

135. A contract between the creditor and the principal debtor by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Surety not discharged when agreement made with third person to give time to principal debtor.

136. Where a contract to give time to the principal debtor is made by the creditor, with a third person, and not with the principal debtor, the surety is not discharged.

Creditor's forbearance to sue does not discharge surety.

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Release of one co-surety does not discharge others

138. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Surety's right to benefit of creditor's securities.

NOTES.—1. As it is common to include a guarantee in a Public Works Department contract, that is to say, to require the contractor to furnish a surety, it is most important that officers should know precisely what acts on their part will have the legal effect of discharging the surety. For example, see section 133. How many officers in one hundred are aware that, in order to keep the surety liable as before, it is absolutely necessary to secure his consent to *any variance whatever* in the terms of the contract!*

Practical value of knowing these sections explained.

2. Mere forbearance to sue or to enforce any other remedy is not a variance which will discharge the surety, but a *contract* to give further time to the debtor would have that effect, unless, of course, the surety assents to the extension of time.

Mere forbearance differs from a contract to forbear.

OF BAILMENT.

CHAP. IX.

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when that purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

"Bailment," "bailor," "bailee" defined.

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

Bailor's duty to disclose faults in goods bailed.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) *A* lends a horse, which he knows to be vicious, to *B*. He does not disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for damage sustained.

(b) *A* hires a carriage of *B*. The carriage is unsafe, though *B* is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury.

* See Chapter IX, Form No. 20

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Illustrations

(*a*) *A* lends a horse, which he knows to be vicious, to *B* He does not disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for damage sustained.

(*b*) *A* hires a carriage of *B*. The carriage is unsafe, though *B* is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury.

* See Chapter IX, Form No. 20

Instance of bailment by Government.

NOTES.—1. The lending of Government tools, or a Government machine, to a contractor is a common example of a bailment interesting to officers. All the sections of this chapter here quoted deserve close attention.

How warning should be given.

2. The warning referred to in section 150 should invariably be given in writing, a copy being kept, and be in most explicit terms.*

Care to be taken by bailee

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

Bailee when not liable for loss, etc., of thing bailed.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed if he has taken the amount of care of it described in section 151.

NOTES.—1. Sections 151—52 prescribe one universal rule for *all* cases of bailment, couched in terms of common sense.

Distinction as to liability before, and after, due date of return of goods.

2. It is to be most carefully noted, however, that the limited liability prescribed by section 150 does not apply when, through the fault of the bailee, the goods have not been returned, delivered, or tendered at the proper time (see section 161). In that event, the bailee's responsibility becomes from that time absolute.

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable, at the option of the bailor, if the bailee does any act with regard to the goods bailed inconsistent with the conditions of the bailment.

Illustration

A lets to *B* for hire a horse for his own riding *B* drives the horse in his carriage This is, at the option of *A*, a termination of the bailment.

Liability of bailee making unauthorised use of goods bailed.

154. If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Same rule applicable to Government land lent.

NOTES.—1. These are useful sections in practice. The same rule would apply to Government land lent to a contractor. Thus, the erection of unnecessary buildings on a piece of land lent merely as a brick-field would entitle the Government to evict the contractor. So the use of Government tools, lent for the purposes

* See Chapter IX, Form No. 21

of one contract only, in the performance of another private contract, would be a clear breach of the conditions of the loan.

2. Under section 154, as also under section 161, the responsibility of a bailee who makes an unauthorised use of the goods is *absolute*. Responsibility of bailee misusing goods.

159. T[illegible] may at any time require its return, [illegible] even though he lent it for a spec. [illegible] if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived. Restoration of goods lent gratuitously.

NOTE —The latter part of this section, which is clearly just, rests on the principle of estoppel. It is intended "to place the borrower in his original position just as if he had never accepted the loan." It is to be noted that the proviso does not apply where either the lender or the borrower dies. Death at once terminates a gratuitous bailment (section 162). Rule rests on 'estoppel.' Its limits

160 It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished. Return of goods bailed on expiration of time or accomplishment of purpose

161 If, by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. Bailee's responsibility when goods are not duly returned.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee. Termination of gratuitous bailment by death.

NOTES —1. The rule enacted in section 160 would apply equally to immovable property lent to a contractor, *e.g.*, for a brick-field. Scope of rule in section 160.

2. The *absolute* responsibility of a bailee who does not return the goods at the proper time has already been pointed out. It is most important.

AGENCY.

Appointment and authority of Agents.

"Agent" and "principal" defined. 182. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal." CHAP.

Who may employ agent. 183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Who may be an agent. 184. As between the principal and third persons, any person may become an agent: but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Consideration not necessary. 185. No consideration is necessary to create an agency.

Agent's authority may be expressed or implied. 186. The authority of an agent may be expressed or implied.

Definitions of expressed and implied authority. 187. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Extent of agent's authority. 188. An agent having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course of conductin~ such business.

Agent's authority in an emergency. 189. An agent has authority in an emergency to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence in his own case under similar circumstances.

Sub-Agents.

When agent cannot delegate. 190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

"Sub-agent" defined. 191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

192. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts as if he were an agent originally appointed by the principal. Representation of principal by sub-agent properly appointed.

The agent is responsible to the principal for the acts of the sub-agent. Agent's responsibility for sub-agent.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong. Sub-agent's responsibility.

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by, or responsible for, the acts of the person so employed, nor is that person responsible to the principal. Agent's responsibility for sub-agent appointed without authority.

NOTES.—1. Hardly any chapter of the Act requires more attentive study by executive officers than that relating to agency. Not a day passes on which hundreds of officers are not dealing with the agents of other persons. It is a regrettable fact that on no subject are more serious mistakes committed than in respect of the powers, the duties, and the liabilities of agents. It is also to be borne in mind that all executive officers are themselves agents of the Secretary of State, and bound to clearly understand their own legal position as such. Immense importance of Agency chapter pointed out. Officers are themselves only agents.

2. The subject of agency is examined in some detail in Chapter VIII of this Manual, it is therefore needless to append lengthy notes to the sections of this Act, especially as these are clearly and intelligibly worded.

3. *Section 186.*—This section must be read as merely enacting a *general* rule. Authority to contract on behalf of Government, for instance, must be conferred "by Resolution in Council." As is explained elsewhere (in Chapter VIII of the Manual) the Contract Act is silent as to a very important distinction recognized both in England and America, and which has also been recognized by the Privy Council (prior to the passing of this Act), between *public* and *private* agents. This significant silence accentuates the importance of leaving no room for controversy as to the Section 186 does not affect special cases where a particular form of authority is required.

powers of officers. If it were shown that certain officers habitually exceeded their powers, *and that the Government could not but be aware of the fact and 'winked' at it*, a very strong case of 'implied agency' could be made out under section 186. It has been well suggested that the powers of officers ought to be printed clearly on the back of all agreement Forms, and should be posted up in every office, together (the compiler would add) with a notice that under no circumstances will Government be bound by any contract entered into by an officer not empowered to contract, or in excess of his powers. If this course be adopted, it seems,—and this is forcibly advocated by distinguished officers,—that the whole question of bringing the existing limitations on the authority of officers as to contracts more into harmony with actual facts and requirements should at the same time be considered.

So, again, the appointment of a pleader, as also that of an agent under the Registration Act, must be in writing.

Scope of section 189.

4. *Section 189.*—This section of course only refers to acts within the scope of the agent's business. It is further limited by emergent necessity. It would *not* empower an Assistant Engineer to give a contract merely because the giving of one was beneficial to Government interests. Such an officer has (at present) no power to contract for Government.

Limits on power to delegate

5. *Sections 190—193.*—These sections define clearly the limited powers of agents to delegate their authority to sub-agents, and the legal consequences of such delegation.

Ratification.

Right of person as to acts done for him without his authority. Effect of ratification.

196. When acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Ratification may be expressed or implied

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Knowledge requisite to valid ratification

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

199. A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part. Effect of ratifying unauthorised act forming part of a transaction.

200. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect. Ratification of unauthorised act cannot injure third person.

NOTES.—1. These sections relating to 'ratification' are of great practical importance. The following essential points should be steadily borne in mind:— Essentials of valid ratification

(*a*) the act must have been done *without the knowledge or authority* of the ratifier;

(*b*) the act must have been done *on behalf of* the ratifier;

(*c*) the ratifier must have a *sound knowledge of the facts;*

(*d*) ratification of a part of a transaction *has the effect of ratifying the whole* transaction; and

(*e*) there can be no ratification of an unauthorised act *so as to injure* a third person's existing legal position.

2. Acquiescence can have the same effect as express ratification. This is a highly important fact, and it has been very recently asserted by the Privy Council. (Hence the imperative duty resting on all responsible officers to *at once challenge any illegal act or state of things as soon as it is discovered.* Infinite trouble is caused, and it is to be feared that much Government property is lost, through disregard of the above most salutary rule. The constant transfers and other changes of officers emphasise the need to resist *at once* encroachments on Government property.) Without adequate knowledge of the facts, there can be no true 'acquiescence'; but the moment that an officer competent to bind the Secretary of State becomes aware that another officer not so authorised has con- Acquiescence may constitute ratification. Rule for invariable observance

tracted on his behalf, it is the duty of the former—unless he resolves to ratify the agreement—to promptly and unmistakably repudiate it.

Revocation of authority.

Termination of agency.

201. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

When termination of agent's authority takes effect as to agent and as to third persons.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Termination of sub-agent's authority.

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Importance of making sure that agent's authority still subsists

NOTES.—1. It is of course at all times necessary to be sure not merely that a person professing to act on behalf of another received authority from that other to do so, but also that such authority *is still subsisting.* Sections 201, 208, and 210 enact the rules of chief importance to executive officers.

Duty of principal.

2. Section 208 protects officers who have justifiably accepted an agent as such. It is incumbent on his principal to *make known* to all whom he has induced to accept another as his agent the revocation of authority. On the other hand, the mode in which the fact becomes known is immaterial. The law looks solely to the fact of actual knowledge.

Immaterial how revocation becomes known.

Effect of agency on contracts with third persons.

Enforcement and consequences of agent's contracts.

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Consequences of notice given to agent.

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between

the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

NOTES.—1. Section 226 declares the general rule that the agent is a mere medium of communication with the principal. This rule is, however, subject to certain exceptions noted further on. True capacity of agent.

2. Section 229 proceeds on the same lines. In law the agent and the principal are deemed identical. The rule is universally understood and acted on. It lies at the root of the law of agency. Deemed identical with principal.

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Agent cannot personally enforce, nor be bound by contracts on behalf of principal

Such a contract shall be presumed to exist in the following cases:— Presumption of contract to contrary

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

NOTES.—1. Sections 230—237 provide a series of most necessary qualifications of the general rule that an agent is a mere instrument. No officer unacquainted with the law here enacted can be sure of his position in dealing with an agent. Without such knowledge he cannot correctly state a case for legal opinion or prepare the necessary evidence when a contract goes into Court. Need for officers to be aware of the Exceptions enacted in sections 230—237.

2. The reason for the three exceptions to section 230 is obvious: in the circumstances detailed, it is evident that *credit was really given to the agent*, and not to a principal who is unknown or unassailable. Reason for the three Exceptions in section 230

3. It must be noted that, just as the agent is *bound* in these exceptional cases, so also he is *entitled* to enforce the contract in his own name. Scope of these exceptions.

Rights of parties to a contract made by agent not disclosed.

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Method of preventing claims under this section suggested.

NOTE.—This is a very serious proposition of law. An officer may discover that he has really contracted with quite a different person from the supposed contractor. The remedy is this: let it be clearly provable that the contract is given to the person named in it on account of his personal qualifications. It will be seen from a perusal of Chapter VIII, Head I, Sub-head (3), of this Manual, that these qualifications may form a most important element in the matter. Then, under the second clause of this section, the officer can refuse to abide by the contract if it be unperformed. Of course there are many contracts, *e.g.*, one for a supply of well-recognised articles, as to which it would be impossible to refuse fulfilment on the above ground. As Mr. Justice Cunningham puts it, the officer "has, in fact, been mistaken; but his mistake does not avoid the contract unless it was material, and in most cases it is not material."

Not in all cases preventible, however

Performance of contract with agent supposed to be principal.

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

NOTE.—This rule rests ultimately on the law of estoppel.

Consequence of inducing agent of principal to act on belief that principal or agent will be held exclusively liable.

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

NOTE.—This is another example of the law of estoppel.

235. A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing. Liability of pretended agent.

NOTE.—This enactment also rests on the law of estoppel. This is the section which renders it so necessary for officers not to exceed the powers vested in them if they wish to act with safety to their own pockets. It will be noticed that the marginal analysis uses the words "pretended agent." But this is not justified by the section itself, which merely says "untruly,"—a far wider term, which officers should carefully note. Importance of this rule to officers explained.

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account. Person falsely contracting as agent not entitled to performance.

NOTES.—1. Sections 232, 234, 235, and 236 lay down useful rules, which require no comment.

2. Perusal of section 236 will show the practical value of carefully preserving proof of the character in which the other party contracted. In the case of Mulchand, frequently quoted in Chapter VIII of this Manual, the individual in question presented a card which did not even give his name, describing him merely as "the agent for the firm of so and so," and thus induced the Executive Engineer to give the contract to the firm. Nothing could be more preposterous in these circumstances than to contend that the contract was given to Mulchand personally; yet he filed a suit in his own name, and two whole days were wasted in defeating it, besides another day in the appeal. *The officer concerned had not preserved the cards above described*, which would have quickly settled the matter. Practical value of *carefully preserving* proof illustrated

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority. Liability of principal inducing belief that agent's unauthorised acts were authorised.

Principle of this rule equally applicable to Government as to private persons

NOTE.—This section is directly based on the great doctrine of estoppel and there can be no doubt that its provisions apply in principle to Government no less than to private individuals. It is a delicate question, and officers will do well to act on the assumption that the Government would not be exempted. They will then be on the safe side. The reason of the rule is clear: "If the principal has been in the habit of ratifying his agent's unauthorised acts, he may have induced persons to believe that such acts are within the scope of the agent's authority, and the agent's acts will accordingly be binding upon him."

Reason of the rule

OF PARTNERSHIP.

"Partnership" defined

239. "Partnership" is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them.

"Firm" defined

Persons who have entered into partnership with one another are called collectively a "firm."

Responsibility of person leading another to believe him a partner.

245. A person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm.

Liability of person permitting himself to be represented as a partner.

246. Any one consenting to allow himself to be represented as a partner is liable as such to third persons who, on the faith thereof, give credit to the partnership.

Great importance of unequivocal conduct.

NOTE.—Sections 245—46 furnish further examples of the doctrine of estoppel. These frequent references to this great principle illustrate its value and importance. Officers should constantly bear in mind that as they are liable to be judged by their conduct, they should steer clear of everything capable of misconstruction.

Partner's power to bind co-partners.

251. Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose.

Exception.—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement.

Important limitation on the powers of partners as such.

NOTES.—1. The first part of this section shows that *as regards acts necessary for, or usually done in,* carrying on the business of the partnership—but no other acts—each partner is the competent agent of the rest: for example, to receive monthly payments under a contract for work done or goods supplied by the firm. The limitation shown in italics must never be lost sight of. Clear proof of authority is necessary, for instance, under sections 19 and 20 of the Limitation Act in order to bind co-partners.

Partners are undoubtedly competent to receive payment of sums due to the firm.

One officer consulted feels doubtful as to the power of each partner to receive money due to the firm and to give valid receipts, and quotes some legal opinion to the contrary, which laid down that "to enable one partner of a firm to receive money for that firm it is necessary for him to receive a power-of-attorney from each of the other partners." This is erroneous. The English law is clearly stated in Lindley on partnership, 7th edition, page 160, and cases there cited, which show that the mere legal relation of partnership confers a power on each partner to receive payments on behalf of the firm without his holding any special power-of-attorney; and section 251 is to the same effect.

How to avoid contracting with petty firms.

It has also been suggested that a chapter should be added to the Manual, giving hints and instructions for the guidance of officers as to the manner of dealing with contractors in partnership. The compiler cannot do better than repeat the advice given at page 216, to have as little as possible to do with petty firms. On the other hand, eminent and respectable firms can be dealt with safely, without extraordinary precautions. As regards a petty firm tendering, it seems quite easy to explain that a tender by one member of the partnership on his sole account is preferred. The partners can make private arrangements to share the profit and loss, while the Government, on the other hand, escapes

all the complications of a joint undertaking by the firm. There is no more profitable rule to follow than that of "*sancta simplicitas*"* in all business matters. The trouble involved in securing it is repaid a hundredfold in the avoidance of disputes and legal imbroglios afterwards. The compiler greatly regrets that want of space forbids his enlarging further on this important subject.

Sancta simplicitas.

Limits of the rule as to *actual* notice.

2. Private agreements, such as are referred to in the Exception, are of no weight unless actual notice of them has been given. The rule is the same under section 208 as regards the termination of the authority of an agent. It is very noteworthy that the rule of actual notice does not apply to a *dissolution* of partnership (see section 264): in that case, 'public notice' is sufficient intimation. This is another reason for avoiding dealings with firms.

Notice of dissolution.

264. Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given unless they themselves had notice of such dissolution.

How 'public notice' must be given.

NOTE.—See note 2 to section 251 just quoted. The 'public notice' referred to is not defined. It seems at least doubtful—and justly so—whether an advertisement in any paper other than the Government Gazette would be held to bind persons not actually aware of the announcement. Officers should certainly not rely on notices published in any newspaper except the Gazette, unless, of course, the Legislature expressly declares other publication to be sufficient, as, for instance, under the Railway Act prior to sales of unclaimed goods.

* "Sacred simplicity."

CHAPTER IV.

THE INDIAN REGISTRATION ACT, III OF 1877.

AS AMENDED BY ACT XII OF 1879.

ABSTRACT OF THE CHAPTER

Of the effects of registration and non-registration.

Miscellaneous provisions.

Scope and advantages of the act explained.

This Act embodies the law regarding the registration of documents. It prescribes those of which registration is compulsory, and declares that it is permissible to register all other documents whatsoever. The great advantages of a law of this kind are obvious. In the first place, registration implies the complete protection of persons interested in the document against future tampering or making away with it; for at the time of registration the document is copied *verbatim** into one of certain prescribed Government registers, and its original terms can thus at all times be established. Again, by rendering the registration of important documents, such as leases for a term of years, deeds of sale or mortgage involving a value of Rs. 100 or upwards, and the like, compulsory, the Legislature has provided the public with a ready means of investigating the state of all titles by enabling any person who chooses to pay certain small fees to search the registration registers, and thus discover all instruments (of which registration is compulsory) in existence affecting the property of which he desires to examine the title. (In those provinces of India to which the Transfer of Property Act, IV of 1882, has been extended, note of which will be found in the chapter relating to that Act, the Legislature has gone further than Act III of 1877 does, and has made a written instrument and registration thereof com-

* "Word for word."

pulsory in the case of certain sales and leases, whereas in provinces outside the operation of Act IV of 1882 such sales and leases *can* be validly effected without any written instrument at all. Chapter VII of this Manual is specially devoted to Act IV of 1882.) Enough has been said to show that the Registration Act is a very practical and useful law. It is, moreover, one whereof certain provisions should be thoroughly understood by all executive officers. Following the principles already stated at page 2 of this Manual, the provisions quoted below from Act III of 1877 are designedly left incomplete for the sake of brevity and simplicity. It is considered that so much as is set out, with the explanations appended, will put officers on their guard in this connection sufficiently for ordinary purposes, subject, where necessary, to reference to the Act itself or in more difficult cases to the Law Officers of Government for advice. Fuller extracts would be inconsistent with the scheme of this Manual.

Only very necessary portions are quoted.

PART I.

PRELIMINARY.

3. In this Act, unless there be something repugnant in the subject or context,—

Interpretation clause.

"lease" includes a counterpart, kabulyat, an undertaking to cultivate or occupy, and an agreement to lease:

"signature" and "signed" include and apply to the affixing of a mark·

"immoveable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to any thing which is attached to the earth, but not standing timber, growing crops, nor grass:

"moveable property" includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immoveable property.

NOTE.—It cannot be too clearly understood that words are always to be interpreted in individual Acts according to the particular meanings, if any, assigned to them by those Acts. "Immoveable property" as defined in Act III of 1877, for example, is by no means identical in meaning with the same term as used in

Limited extent of statutory definitions explained.

the Forest Act VII of 1878. It is essential to bear in mind the exact meaning of "immoveable property" as employed in Act III of 1877 in order to determine what instruments do and what do not fall within the compulsory registration section 17.

PART III.

OF REGISTRABLE DOCUMENTS.

Documents of which registration is optional

17. The documents next hereinafter mentioned shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or Act No. XX of 1866, or Act No. VIII of 1871, or this Act, came or comes into force (that is to say),—

(*a*) instruments of gift of immoveable property;

(*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property;

(*c*) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(*d*) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent:

Provided that the Local Government may, by order published in the official Gazette, exempt from the operation of the former part of this section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years, and the annual rents reserved by which do not exceed fifty rupees.

Documents of which registration is optional.

18. Any of the documents next hereinafter mentioned may be registered under this Act (that is to say),—

* * * * * * * *

(*f*) all other documents not required by section 17 to be registered.

Above extracts practically reliable

NOTES.—1. The above portions of sections 17 and 18 deal with most of the cases likely to arise in practice. They are subject to certain exceptions not of very common occurrence.

2. The Act extends to the whole of British India, except certain tracts specially excluded from its operation, *viz.*, the Scheduled Districts of the Madras Presidency and the Arakan Hill Tracts District. Scope of the Act.

20. The registering officer may in his discretion refuse to accept for registration any document in which any interlineation, blank, erasure, or alteration appears, unless the persons executing the document attest with their signatures or initials such interlineation, blank, erasure, or alteration. If he register such document, he shall, at the time of registering the same, make a note in the register of such interlineation, blank, erasure, or alteration. Documents containing interlineations, blanks, erasures, or alterations.

21. (*a*) No non-testamentary document relating to immoveable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same. Description of parcels.

(*b*) Houses in towns shall be described as situate on the north or other side of the street or road (mentioning it) to which they front, and by their existing and former occupancies, and by their numbers if the houses in such street or road are numbered. Other houses and lands shall be described by their name, if any, and as being in the territorial division in which they are situate, and by their superficial contents, the roads and other properties on which they abut, and their existing occupancies, and also, whenever it is practicable, by reference to a Government map or survey.

(*c*) No non-testamentary document containing a map or plan of any property comprised therein shall be accepted for registration unless it be accompanied by a true copy of the map or plan, or, in case such property is situate in several districts, by such number of true copies of the map or plan as are equal to the number of such districts. Documents containing maps or plans.

NOTES.—1. These two sections indicate certain matters to which attention must be paid in preparing a document for registration. A conveyance is useless which leaves the property uncertain to which it is intended to apply. Erasures, etc., should obviously be attested by both parties; but it is far better to invariably correct in red ink than under any circumstances to erase. Uselessness of vague conveyance. Erasures never expedient.

2. As a copy of the plan must be deposited with the registering officer, it is to be borne in mind (*a*) that there must be a separate copy for each district in which any part of the property comprised in the instrument is situate; and (*b*) that the original plan and all copies Points to remember as to plans.

of it must be *identical*, and must be signed as true copies by all parties to the instrument.

Plans must be absolutely accurate.

3. These plans must be prepared with absolute accuracy. It is not at all generally known that in the event of a discrepancy between the description of the property as set out in a conveyance and the delineation of the same in the plan annexed to, and forming part of, the conveyance, the plan would prevail over the description. This is placed beyond doubt by illustration (*c*) to section 92 of the Evidence Act, I of 1872, which is as follows:—

(*c*) An estate, called "the Rampur Tea Estate," is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate *and was meant to pass by the deed* cannot be proved.

It is therefore of great importance that the plan and the description of the "parcels" intended to be conveyed shall agree exactly; but, above all, the plan should accurately delineate all the property which is to be included, and no more.

PART IV.

OF THE TIME OF PRESENTATION.

Time for presenting documents.

23. Subject to the provisions contained in sections 24, 25, and 26, no documents other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution;

or, in the case of a copy of a decree or order, within four months from the day on which the decree or order was made, or, where it is appealable, within four months from the day on which it becomes final:

Provided that, where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution.

Certain exceptions to the rule.

NOTES.—1. The above rule is, as the section says, subject to certain exceptions which relate to cases of unavoidable delay, of instruments executed out of British India, and of the registration office being closed on the last day of the usual period.

Prompt registration commended.

2. It will be noticed from the proviso that an instrument can be executed by several persons at different times and places, and can be presented for registration

after each such execution. This is frequently the best course to pursue, *e.g*, if one executant be about to leave India. The sooner that important documents are registered after their execution, the better. A recalcitrant party, refusing after a while to admit execution, may give much trouble.

PART V.

OF THE PLACE OF REGISTRATION.

28. Save as in this part otherwise provided, every document mentioned in section 17, clauses (*a*), (*b*), (*c*) and (*d*), and section 18, clauses (*a*), (*b*) and (*c*), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate. Place for registering documents relating to land.

29. Every document other than a document referred to in section 28, and a copy of a decree or order, may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was executed, or in the office of any other Sub-Registrar under the Local Government at which all the persons executing and claiming under the document desire the same to be registered. Place for registering other documents

NOTE.—The above sections give the general rules. It is needless to particularise other special means of registering elsewhere, which are also provided by the Act.

PART VI.

OR PRESENTING DOCUMENTS FOR REGISTRATION.

32. Except in the cases mentioned in section 31 and section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office, Persons to present documents for registration.

by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order,

or by the representative or assign of such person,

or by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned.

33. For the purposes of section 32, the powers of-attorney next hereinafter mentioned shall alone be recognised (that is to say),— Powers-of-attorney recognisable for pu seotu

(*a*) if the principal at the time of executing the power-of-attorney resides in any part of British a

in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides:

(*b*) if the principal at the time aforesaid resides in any other part of British India, a power-of-attorney executed before and authenticated by any Magistrate:

(*c*) if the principal at the time aforesaid does not reside in British India, a power-of-attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of His Majesty or of the Government of India.

Importance of verifying power of agent to admit execution explained.

NOTES.—1. If the great probative value of registered instruments be duly borne in mind, the importance of conclusive proof that their execution is admitted *by a duly authorised person* will be clear. Neglect of this precaution may result in subsequent repudiation of the instrument and loss of the security which it purports to give. Officers who find it necessary to attend to registration of documents should therefore be most careful to satisfy themselves that the law is duly observed on this point. It will be noticed that powers-of-attorney purporting to authorise a person to admit execution on behalf of an absent executant must not only be authenticated by, *but also be executed in the actual presence of*, the authority specified in section 33. This is quite a special provision of law, very apt to be overlooked.

Adequate *purport* sufficient.

2. It is sufficient if the power-of-attorney *purports* on the face of it to have been duly executed and authenticated (section 33).

Rare exemptions to be found in Act.

3. There are certain exemptions provided as to personal attendance for the above purpose, not of common occurrence, as to which the Act can be referred to.

PART X.

OF THE EFFECTS OF REGISTRATION AND NON-REGISTRATION.

Time from which registered docu-

47. A registered document shall operate from the time from which it would have commenced to operate if no regis-

tration thereof had been required or made, and not from the time of its registration. ment operates.

48. All non-testamentary documents duly registered under this Act, and relating to any property, whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession. Registered documents relating to property when to take effect against oral agreement.

49. No document required by section 17 to be registered— shall affect any immoveable property comprised therein, or confer any power to adopt, Effect of non-registration of documents required to be registered.

or be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered in accordance with the provisions of this Act.

50. Every document of the kind mentioned in clauses (*a*), (*b*), (*c*), and (*d*) of section 17, and clauses (*a*) and (*b*) of section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. Registered documents relating to land of which registration is optional to take effect against unregistered documents.

Nothing in the former part of this section applies to leases exempted under the proviso in section 17, or to the documents mentioned in clauses (*e*), (*f*), (*ff*), (*g*), (*h*), (*i*), (*j*), (*k*), (*l*), (*m*), (*n*), and (*o*) of the same section.

NOTE.—The above-quoted sections show the great legal value of registration, and are indispensable to a correct application of the law. No adequate opinion can be formed as to the legal value of any instrument until the questions whether it does or does not require registration, and, if it does, whether it has or has not been duly registered, have been decided; while if it be a document of any sort referred to in section 50 and it is unregistered, the important further question at once arises whether it is not subject to a duly registered instrument which will prevail over it. This fact can always be ascertained by searching the registration registers. Need to know these sections in weighing the value of legal instruments

PART XV.

MISCELLANEOUS.

88. Notwithstanding anything herein contained, it shall not be necessary for any officer of Government, or for the Ad- Registration of documents

executed by Government officers or certain public functionaries.

ministrator General of Bengal, Madras or Bombay, or for any Official Trustee, or Official Assignee, or for the Sheriff, Receiver or Registrar of a High Court, to appear in person or by agent at any registration office in any proceeding connected with the registration of any instrument executed by him in his official capacity or to sign as provided in section 58.

But, when any instrument is so executed, the registering officer to whom such instrument is presented for registration may, if he think fit, refer to any Secretary to Government or to such officer of Government, Administrator General, Official Trustee, Official Assignee, Sheriff, Receiver or Registrar, as the case may be, for information respecting the same, and, on being satisfied of the execution thereof, shall register the instrument.

How the exemptions in section 88 are justified.

NOTES.—1. The exemption enacted by section 88 saves officers much time and trouble, and is justified by the principle embodied in section 57 (7) of the Evidence Act, I of 1872, under which even Courts of justice are bound to "take judicial notice" of......the signatures of gazetted officers of Government, *i.e.*, to accept them as genuine without formal proof. It need hardly be explained that this does not mean that where an officer's signature is challenged as a forgery, it is not open to the parties to offer, and to the Court to require, proof on the subject. Similar power is reserved to the registering officer by the latter part of section 88 of Act III of 1877.

2. The documents enumerated in section 90 (not quoted) are wholly exempt from the law as to registration. The exemptions do not seem useful enough to executive officers to be worth inserting here.

CHAPTER V.

THE INDIAN LIMITATION ACT, IX OF 1908.

ABSTRACT OF THE CHAPTER.

Technical though this Act may at first sight appear to be, it is nevertheless most important that officers should understand its general scope. Great trouble is not unfrequently occasioned by ignorance of the effect of certain acts or omissions under the law of limitation. It is unnecessary for officers to attempt to master the very elaborate schedule which prescribes a great variety of periods within which suits may be brought, applications made, and so on. What is of consequence is, that officers shall understand the main principles of the law and know how to apply them. There is no law upon ignorance of which contractors and their lawyers more frequently or more successfully endeavour to trade.

Cogent necessity for officers to understand general scope of the Act.

The law of limitation is an artificial law founded on the maxim "*interest reipublicae ut finis sit litium*,"* its object being to compel people to carry their disputes into Court promptly, if at all. To this end our Act fixes a definite period for every distinct class of

Basis of the Law.

* "It is to the interest of the State that there be an end to litigation."

suit, proportioned to the nature of it, within which the suit must be filed, or the cause of action and the right to be enforced by suit are extinguished. But certain saving provisions are necessarily provided in the Act, whereby the period of limitation is extended or renewed; and it is more especially with reference to these provisions that officers should be well informed and on their guard. All suits, whatsoever their nature, instituted, *on behalf of* Government, can be instituted within the long period of sixty years; but many suits *against* Government must be filed within very short periods, unless these be extended or renewed. The most common example is Article 115 of the second schedule of the Act: "for compensation for the breach of any contract, express or implied, not in writing [and] *registered* and not herein specially provided for." This is the ordinary sort of claim against Government arising out of contracts. Attempts to entrap officers of Government into acts or omissions which would have the legal effect of such extension or renewal are by no means uncommon. Resistance to such devices is perfectly justifiable. The Government is exceptionally ill-qualified to repel unjust claims after a long period has elapsed. The officers cognisant of the facts are removed by transfer, leave, retirement, death, and other causes. The records bearing on the case may be destroyed under departmental rules, or through accident, or may be lost or even stolen, as has frequently happened. The memory of public officers, occupied with a multiplicity of affairs, cannot be relied on for an indefinite period, and their accuracy is constantly attacked in Court, even if wilful misrepresentation be not laid to their charge, as is occasionally done. Nothing can therefore be more just than that individuals who assert a grievance against Government should seek legal redress, if at all, within the prescribed period and should not be allowed to protract that period by aid of written admissions artfully obtained from the officers concerned. Demands departmentally preferred should, on the other hand, be disposed of with all reasonable promptitude, so that the period within which the claimant, if dissatisfied, may take legal action shall not be unfairly curtailed,

Period for suits *by* and *against* Government

Common device to entrap officers into admissions.

The Limitation Act extends to the whole of British India. It is obligatory on the Court to dismiss any suit, appeal, or application filed after the prescribed period has expired, even though the other party does not set up that fact as a defence. In this respect the law of British India is different from the law of England. Scope and obligatory operation of the Act.

The only portions of the Act which it seems necessary to print in this Manual are sections 19, 20 and 21, in the part relating to computation of the period of limitation, and which are very important. These sections should be constantly borne in mind.

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

19. (1) Where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. Effect of acknowledgment in writing

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.

Explanation 1—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance, or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2.—In this section "signed" means signed either personally or by an agent duly authorised in this behalf.

NOTES.—1. Careful perusal of the above section will show how cautious an officer should be in his communications with persons likely to bring suits against the Government. It will be noticed that the acknowledgment of liability must be made *before the expiration* of the period prescribed; and a very common Acknowledgment must be prior to expiration of prescribed period. Common device of contractors explained.

device of persons who are deliberately postponing action until the officers and evidence available against them are out of the way is to secure an admission of this kind as near the expiry of the prescribed period as possible, thus enabling themselves to further protract their "waiting game." If this attempt be frustrated, the claimant is—as he ought to be—driven into Court without further delay, while the Government is still in a position to defend itself effectively. The proper way to defeat endeavours to prolong the period allowed by law is a simple one, *viz*, to carefully head all replies to such communications from the other side with the words "*without prejudice*."* This is a technical phrase understood in law to bring the communication within the scope of section 23 of the Evidence Act, I of 1872, and to protect it from disclosure. The writer knows an instance of an officer being deliberately entrapped into giving what was adduced in Court as an acknowledgment entitling the contractor to a fresh period of limitation. The danger is a very real and practical one indeed.

How to defeat it.

There must be *intention* to admit liability.

2. The acknowledgment must be one *intended* by the person making it to admit liability. Of course a promise merely to "investigate" a claim does not amount to an acknowledgment.

Rule of infinite extent.

3. Just as one acknowledgment can give rise to a new period of limitation, so a second acknowledgment can give rise to a third period, and so on *ad infinitum*.†

'Duly authorised.'

4. The words of the second explanation, "duly authorised in this behalf," do not mean *specially* or *expressly* authorised, but merely that the admission must be within the scope of the agent's powers.‡

The admission must be made before the termination of his authority.§

Effect of payment of interest as such.

20. (*1*) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf,

* See Chapter IX, Form No 22, and rule 3, Civil Suit Rules, Appendix D.
† "Without end"
‡ P. R No 7 of 1890.
§ L. R. 7 I. A., 8.

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, Effect of part-payment of principal.

a fresh period of limitation shall be computed from the time when the payment was made.

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

NOTES.—1. The principle of the doctrine underlying this provision is that any such payment is an acknowledgment of the existence of the debt, from which the law infers an undertaking to pay the balance. If, therefore, there be no intention in admitting or paying a given sum to a claimant of acknowledging any further liability, it is most important to clearly negative such intention when making the payment. If this be properly done, no extension of the period of limitation will ensue, "because the principle upon which a part-payment takes a case out of the statute [*i.e.*, prolongs the period of limitation] is that it admits a greater debt to be due at the time of part-payment." Principle underlying this provision.

2. All the notes appended to section 19 *supra* also apply to section 20.

3. Officers cannot bear too prominently in mind the provisions of these two sections whenever it is necessary to correspond with persons advancing or reviving claims more or less stale against Government. These sections should never be forgotten.

21. (2) Nothing in the said sections renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them. One of several joint contractors, etc., not chargeable by reason of acknowledgment or payment made by another of them.

NOTE.—It is, of course, competent to joint contractors, etc., to duly authorise each other to give acknowledgments and part-payments binding on all. This point will be referred to again in Chapter VIII.

CHAPTER VI.

THE INDIAN STAMP ACT, II OF 1899.

AS AMENDED BY ACT, XV OF 1904.

ABSTRACT OF THE CHAPTER.

Why officers ought to have some acquaintance with the Stamp Act.

Some general acquaintance with the law on this subject is required by all officers whose duty brings them into contact with legal instruments. For example, a person offers to deposit with Government as security the title-deeds of his house or a promissory note or other document in his favour. Time may not admit of a reference to the legal advisers of Government as to the correctness and value of the document : the executive officer must decide this as best he can. But due stamping, like registration, where compulsory by law, is essential, and officers should therefore know how to test it. It is impossible at once to omit any considerable portion of the Stamp Act (of which the schedules annexed to it form part) from this

Manual, and yet to furnish in it a complete and safe guide on this branch of the law. It will, however, perhaps be useful to state the general scope of the Act and some of its main principles, and to deal briefly with some of those matters which most frequently arise under it in practice. Where necessary, the Act itself can be consulted.

Extent and character of the Act.

The Stamp Act extends to the whole of British India. It is a "fiscal" Act, not a "penal" one; that is to say, its principal object is to benefit the revenue, not to create offences. For this reason, with the exception of certain specified instruments only, the omission to duly stamp a document can be rectified afterwards (section 35) by payment of the proper duty and a penalty, or, in case of a receipt, by payment of a penalty alone, or, in particular circumstances, without a penalty (section 41); but these provisions are not intended to legalise or excuse *intentional* evasion of the law, which is a criminal offence. Apart from "court-fees," no instrument of a kind not mentioned in the first schedule of the Act requires any stamp, and only such of these instruments again as fall within the scope of section 3 (*infra*) must be stamped. Next, it is necessary to remember that the Government, for whose benefit the Act is passed, is free (section 9) to reduce or remit any stamp duties at pleasure. This power has been extensively used, as will be explained further on. The time and manner of stamping, the sort and number of stamps to be used, and the question by whom the duty is payable, are all material, and carefully provided for by the Act, or by the rules made under it. It also furnishes means of readily securing within certain limits of time an authoritative opinion as to the amount of stamp duty, if any, properly payable (section 31). Where possible, recourse will always be had with advantage in doubtful cases to this useful provision. The adjudication thus got is final and conclusive.

Government can remit stamp duty.

Matters to be attended to in examining a document as to stamp.

The matters requiring attention in order to decide whether a document satisfies the Stamp Act include the following:—

(1) Is the instrument mentioned in Schedule I?

As to this point, the definitions prefixed to the Act will explain what the particular document is, and a glance at Schedule I (the headings of which alphabetically arranged will be found *infra**) will show whether it is of a kind liable to duty or not. Schedule I.

(2) Is the instrument chargeable as falling within section 3? Section 3.

(3) Is it an instrument expressly exempted from duty? Is it exempted?

The exemptions are ordinarily given under each article in Schedule I, but certain general exemptions are provided by section 3 including the very important one relating to Government. The Act itself is accessible to all officers, and it is sufficient to warn them of the need to make sure that the document in hand is not thus exempted from duty before objecting to it for want of a stamp.

(4) Is the instrument specially exempted from duty by any notification of Government issued under section 9? Section 9.

By Notification No. 785 S. R., dated 17th February 1899, duties were reduced or remitted on certain documents given in Part I of Appendix A of the Stamp Act. Amongst other documents so exempted are agreements by a contractor with the Public Works Department for the due performance of the contract.

(5) If stamped, is the stamp used of the proper kind? Is stamp of proper kind?

This opens up a large and troublesome subject. To print in the Manual the whole of the rules relating to it would be very inconvenient. It seems preferable to explain where those rules can be found, and to briefly indicate their main features. There are three distinct sorts of stamps for use under Act II of 1899, *viz*, (*a*) adhesive stamps, *e.g.*, a common receipt stamp which can be affixed by any person, and (*b*), (*c*), impressed stamps, subdivided into (*b*) impressed *sheets*,—that is to say, sheets of paper bearing the impression of stamps of different values engraved thereon, and sold

*At page 160.

to the public for use by them in accordance with the rules,—and (c) impressed *labels*, which are adhesive stamps to be affixed *and impressed* by certain Government officers only, as directed by the rules. All instruments, except some hundis, *may* be written on impressed *sheets*, and, except as provided by section 11 and by the rules under the Act, *must* be so written. Only the instruments enumerated in section 11 of the Act may be stamped with adhesive stamps. A large number of instruments *may* be stamped with impressed *labels*. These are enumerated in rule 9. The rules will be found in Part II of Appendix A of the Stamp Act.

It is useful to remember in practice that, unless the instrument is a hundi, if it be written on an impressed sheet, the stamp is certainly right as to *kind*.

Section 12.

(6) If the stamp be an adhesive one (not an "impressed label"), has it been duly cancelled?

See section 12 of the Act.

Meaning of 'duly cancelled.'

Attention is drawn to the words "duly cancelled." The cancellation is to be of such a nature that the stamp cannot be used again. By sub-clause 3 of the section it is provided that the stamp may be cancelled by the person required to do so by writing on or across the stamp his name or initials or the name or initials of the firm with the time and date of the writing "or in any other effectual manner." It has been held (I. L. R. 28 Bom. 432) that the mere drawing of two parallel lines without more over a receipt stamp does not have the requisite effect.* Similarly it has been held that a stamp was not cancelled by a small portion of the first letter of a person's signature consisting of a slightly curved line.

Section 13.

(7) If the stamp be an impressed one, does the stamp appear on the face of the instrument?

See section 13 of the Act. Section 14 further prohibits the writing of more than one instrument on the same stamp-paper. Neglect of either section is fatal (section 15).

* The correctness of this decision was questioned by the Punjab Chief Court in the case reported in the Punjab Record as No 108 of 1908.

(8) Was the instrument stamped either "before or at the time of execution"? Section 17.

This is universally necessary as regards instruments executed by any person in British India (section 17). It is an extremely common error to suppose that the stamping of an instrument can be postponed till a dispute occurs and the need to produce the document in Court arises. As already explained, the law provides means to remedy the omission of a stamp under certain circumstances.

(9) If the instrument is stamped with an impressed stamp or stamps, is the proper number of stamps used? Is proper number of stamps used?

This is another troublesome point. Disregard of the rules under the Act on this subject, which have the force of law, will invalidate the stamping. It may suffice to here remark that the rules never insist on a plurality of stamps, so that a single stamp of the full amount required or of higher value must be correct, and that, where several stamps are used, the rule on the subject should be consulted (rule 6, Part II, Appendix A of the Stamp Act). Hundis are subject to special rules to be found in the same notification.

(10) Is the stamp affixed correct in amount? Is stamp correct in amount?

This must be ascertained by reference to Schedule I of the Act.

Most of those parts of the Act referred to in the preceding notes, and a few other sections likely to be useful to executive officers, are now appended.

PRELIMINARY.

CHAP. I. 2. In this Act, unless there is something repugnant in the subject or context— Interpretation clause.

(5) "Bond" includes— "Bond."

(*a*) any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be:

(*b*) any instrument attested by a witness and not payable to order or bearer whereby a person obliges himself to pay money to another; and

(c) any instrument so attested whereby a person obliges himself to deliver grain or other agricultural produce to another:

"Chargeable." (6) "Chargeable" *means, as applied to an instrument* executed or first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in British India when such instrument was executed or, where several persons executed the instrument at different times, first executed:

"Cheque." (7) "Cheque" means a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand :

"Conveyance." (10) "Conveyance" includes a conveyance on sale and every instrument by which property, whether moveable or immoveable, is transferred *inter vivos*, and which is not otherwise specifically provided for by Schedule I:

"Duly stamped." (11) "Duly stamped" as applied to an instrument means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in British India:

"Lease." (16) "Lease" means a lease of immoveable property, and includes also—

(a) a patta,

(b) a kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy, or pay or deliver rent for, immoveable property,

(c) any instrument by which tolls of any description are let, and

(d) any writing on an application for a lease intended to signify that the application is granted:

"Mortgage-deed." (17) "Mortgage-deed" includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to or in favour of another, a right over or in respect of specified property:

"Power-of-attorney." (21) "Power-of-attorney" includes any instrument (not chargeable with a fee under the law relating to Court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it :

"Receipt." (23) "Receipt" includes any note, memorandum or writing—

(a) whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received, or

(b) whereby any other moveable property is acknowledged to have been received in satisfaction of a debt, or

(c) whereby any debt or demand, or any part of a debt or demand, is acknowledged to have been satisfied or discharged, or

(d) which signifies or imports any such acknowledgment,

and whether the same is or is not signed with the name of any person.

NOTE.—It will be observed that several of the above definitions are highly technical and include much more than the terms defined are generally understood in ordinary parlance to mean. Take, for instance, the definition of "bond." No one would popularly suppose such an instrument as that defined in (5) (c) to be a "bond." Unless "attested," it is not a bond: attestation in this case makes all the difference. The utmost care must be exercised to bear in mind that the Acts of the Legislature have a language of their own; that this language is by no means uniform throughout the statute-book; and that all definitions in particular Acts are doubly limited, *viz.*, (a) to the Act itself, (b) by any "repugnancy in the subject or context." Some terms indeed have been dealt with and defined, in the absence of repugnancy, for all future Acts by what are known as "the General Clauses Acts;" but, except as to these terms, the rule prevails that words defined in an Act are so defined *for the purposes of that Act and no more, and always subject also to any repugnancy in the context.* It should be borne in mind that the definitions in which the word "includes" is used instead of the word "means" are not exhaustive. Technical and doubly limited extent of definitions in Acts explained.

STAMP DUTIES.

A.—Of the liability of instruments to duty.

CHAP. II.

3. Subject to the provisions of this Act and the exemptions contained in schedule I, the following instruments shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively, that is to say— Instruments chargeable with duty.

(a) Every instrument mentioned in that schedule, which, not having been previously executed by any person, is executed in British India on or after the first day of July 1899:

(b) Every bill of exchange, cheque or promissory note drawn or made out of British India on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in British India: and

(c) Every instrument (other than a bill of exchange, cheque or promissory note) mentioned in that schedule, which, not having been previously executed by any person, is executed out of British India on or after that day, relates to any property situate, or to any matter or thing done or to be done, in British India, and is received in British India.

Provided that no duty shall be chargeable in respect of—

(1) Any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894, or under Act XIX of 1838, or the Indian Registration of Ships Act, 1841, as amended by subsequent Acts.

Several instruments used in single transactions.

4. (1) Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I for the conveyance, mortgage or settlement and each of the other instruments shall be chargeable with a duty of one rupee instead of the duty (if any) prescribed for it in that schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purposes of sub-section (1) be deemed to be the principal instrument.

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

Instruments relating to several distinct matters

5. Any instrume several distinct matters shall b gate amount of the duties with each comprising or relating to one of such matters, would be chargeable under this Act.

Power to reduce or remit duty.

9. The Governor General in Council may, by rule or order published in the *Gazette of India*,

(a) reduce or remit, whether prospectively or retrospectively, in the whole or any part of British India,

the duties with which any instruments or any particular class of instruments, or any of the instruments belonging to such class, or any instruments when executed by or in favour of any particular class of persons, or by or in favour of any members of such class, are chargeable.

B.—Of stamps and the mode of using them.

11. The following instruments may be stamped with adhesive stamps, namely:—

Use of adhesive stamps.

(a) instruments chargeable with the duty of one anna, except parts of bills of exchange payable otherwise than on demand and drawn in sets;

(b) bills of exchange, cheques and promissory notes drawn or made out of British India.

Cancellation of adhesive stamps.

12. (1) Whoever affixes any adhesive stamp to any instrument chargeable with duty, which has been executed by any person, shall, when affixing such stamp, cancel the same so that it cannot be used again;

and whoever executes any instrument on any paper bearing an adhesive stamp shall, at the time of execution, unless such stamp has been already cancelled in manner aforesaid, cancel the same so that it cannot be used again.

(2) Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again shall, so far as such stamp is concerned, be deemed to be unstamped.

(3) The person required by sub-section (1) to cancel an adhesive stamp may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner.

How instruments stamped with impressed stamps are to be written.

13. Every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument.

Only one instrument to be on same stamp.

14. No second instrument chargeable with duty shall be written upon a piece of stamped paper upon which an instrument chargeable with duty has already been written: Provided that nothing in this section shall prevent any endorsement which is duly stamped or is not chargeable with duty being made upon any instrument for the purpose of transferring any right created or evidenced thereby, or of acknowledging the receipt of any money or goods the payment or delivery of which is secured thereby.

Instruments written contrary to section 13 or 14 deemed unstamped.

15. Every instrument written in contravention of section thirteen or section fourteen, shall be deemed to be unstamped.

C.—Of the time of stamping instruments.

Instruments executed in British India.

17. All instruments chargeable with duty and executed by any person in British India shall be stamped before or at the time of execution.

Instruments executed out of British India.

18. (1) Every instrument chargeable with duty executed only out of British India, and not being a bill of exchange, cheque or promissory note, may be stamped within three months after it has been first received in British India.

(2) Where any such instrument cannot, with reference to the description of stamp prescribed therefor, be duly stamped by a private person, it may be taken within the said period of three months to the Collector, who will stamp the same, in such manner as the Governor General in Council may by rule prescribe, with a stamp of such value as the person so taking such instrument may require and pay for.

E.—Duty by whom payable.

Duties by whom payable

29. In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne—

(a) in the case of any instrument described in any of the following articles of schedule I, namely,—

No. 2. (Administration Bond),
No. 6. (Agreement to Mortgage),
No. 13. (Bill of Exchange),
No. 15. (Bond),
No. 26. (Customs Bond),
No. 32. (Further Charge),
No. 34. (Indemnity Bond),
No. 40. (Mortgage Deed),
No. 49. (Promissory note),
No. 55. (Release),
No. 57. (Security Bond or Mortgage Deed),
No. 62. (c) (Transfer of any interest secured by a bond, mortgage deed or policy of insurance)—by the person drawing, making or executing such instrument,

(b) in the case of a policy of insurance—by the person effecting the insurance:

(c) in the case of a conveyance (including a reconveyance of mortgaged property) by the grantee: in

the case of a lease or agreement to lease—by the lessee or intended lessee:

(*d*) in the case of a counterpart of a lease—by the lessor:

(*e*) in the case of an instrument of exchange—by the parties in equal shares:

(*f*) in the case of a certificate of sale—by the purchaser of the property to which such certificate relates: and

(*g*) in the case of an instrument of partition by the parties thereto in proportion to their respective shares in the whole property partitioned, or, when the partition is made in execution of an order passed by a Revenue Authority or a Civil Court or arbitrator, in such proportion as such authority, Court or Arbitrator directs.

NOTES.—1. *Section 17.*—It is specially necessary to examine executed instruments chargeable with a one-anna duty, because stamping of these (and some others) subsequently to execution is specially prohibited by the Act, and the absence of stamp before execution is therefore irremediable.—An unstamped receipt can be produced in evidence on payment of a penalty of one rupee.

One-anna stamp documents need specially careful examination.

Section 29.—It is to be borne in mind that the parties can always regulate by agreement the question by whom the duty on any instrument whatever is to be paid. In this connexion reference may usefully be made to the general exemption under section 3 which is as follows:—

General exemption in favour of Government.

"Provided that no duty shall be chargeable in respect of—

(1) Any instrument executed by, or on behalf of, or in favour of the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument."

By utilising this exemption, any instrument can be rendered free of duty. All that is necessary is to insert in it a clause, under section 29 of the Act, whereby the Government agrees to bear the expense of providing the proper stamp. The general exemption under section 3 then steps in, and obviates the need of any stamp at all.

ADJUDICATION AS TO STAMPS.

Adjudication as to proper stamp.

31. (1) When any instrument, whether executed or not, and whether previously stamped or not, is brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of such amount (not exceeding five rupees and not less than eight annas) as the Collector may in each case direct, the Collector shall determine the duty (if any) with which in his judgment the instrument is chargeable: CHAP

Collector may call for abstract and evidence.

(2) For this purpose the Collector may require to be furnished with an abstract of the instrument, and also with such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of the duty with which it is chargeable, are fully and truly set forth therein, and may refuse to proceed upon any such application until such abstract and evidence have been furnished accordingly.

Certificate by Collector.

32. (1) When an instrument brought to the Collector under section thirty-one is in his opinion one of a description chargeable with duty, and

(a) the Collector determines that it is already fully stamped, or

(b) the duty determined by the Collector under section thirty-one, or such a sum as, with the duty already paid in respect of the instrument, is equal to the duty so determined, has been paid,

the Collector shall certify by endorsement on such instrument that the full duty (stating the amount) with which it is chargeable has been paid.

(2) When such instrument is in his opinion not chargeable with duty, the Collector shall certify in manner aforesaid that such instrument is not so chargeable.

(3) Any instrument upon which an endorsement has been made under this section shall be deemed to be duly stamped, or not chargeable with duty, as the case may be; and, if chargeable with duty, shall be receivable in evidence or otherwise, and may be acted upon and registered as if it had been originally duly stamped.

Provided that nothing in this section shall authorise the Collector to endorse—

(a) any instrument executed or first executed in British India and brought to him after the expiration of one month from the date of its execution or first execution as the case may be;

(b) any instrument executed or first executed out of British India and brought to him after the expiration of three months after it has been first received in British India; or

(c) any instrument chargeable with the duty of one anna, or any bill of exchange or promissory note, when brought to him after the drawing or execution thereof on paper not duly stamped.

35. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:— Instruments not duly stamped inadmissible in evidence, etc.

Provided that—

(a) any such instrument not being an instrument chargeable with a duty of one anna only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of

the Government, or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.

True scope of section 31 explained.

NOTE.—Executive officers will find section 31 a most convenient resource when in any doubt as to the amount of duty chargeable. And although the early part of the section only refers to the *amount* of duty, and does not touch those other points indicated above as equally material, yet it is important to notice that lower down it is distinctly provided that "any instrument upon which an endorsement has been made under this section shall be deemed to be *duly stamped*, or not chargeable with duty, as the case may be." Thus the certificate would also conclusively cover every other point essential to "duly stamping." (See the definition of this expression, *supra*). There are, however, large restrictions on the powers of the Collector under section 31 as to time and certain instruments specified (see the end of section 32).

SHEDULE I.

Description of instruments liable to duty.

1. ACKNOWLEDGMENT OF A DEBT.
2. ADMINISTRATION-BOND.
3. ADOPTION-DEED.
4. AFFIDAVIT.
5. AGREEMENT OR MEMORANDUM OF AN AGREEMENT.
6. AGREEMENT BY WAY OF EQUITABLE MORTGAGE.
7. APPOINTMENT IN EXECUTION OF A POWER.
8. APPRAISEMENT OR VALUATION.
9. APPRENTICESHIP-DEED.
10. ARTICLES OF ASSOCIATION OF A COMPANY.
11. ARTICLES OF CLERKSHIP.
12. AWARD.
13. BILL OF EXCHANGE.
14. *BILL OF LADING.*
15. BOND.
16. BOTTOMRY BOND.
17. CANCELLATION.
18. CERTIFICATE OF SALE.
19. *CERTIFICATE OR OTHER* DOCUMENT.
20. CHARTER PARTY.
21. CHEQUE.
22. COMPOSITION DEED.
23. CONVEYANCE.
24. COPY OR EXTRACT.
25. COUNTERPART OR DUPLICATE.
26. CUSTOMS BOND.
27. DEBENTURE.
28. DELIVERY ORDER IN RESPECT OF GOODS.
29. DIVORCE.
30. ENTRY AS AN ADVOCATE, VAKIL OR ATTORNEY ON THE ROLL OF ANY HIGH COURT.
31. EXCHANGE OF PROPERTY.
32. *FURTHER CHARGE.*
33. GIFT.
34. INDEMNITY BOND.
35. LEASE.

36. Letters of Allotment of Shares.
37. Letter of Credit.
38. Letter of License.
39. Memorandum of Association of a Company.
40. Mortgage Deed.
41. Mortgage of a Crop.
42. Notarial Act.
43. Note or Memorandum.
44. Note or Protest by the Master of a Ship.
45. Partition.
46. Partnership.
47. Policy of Assurance.
48. Power-of-Attorney.
49. Promissory Note.
50. Protest of Bill or Note.
51. Protest by the Master of a Ship.
52. Proxy.
53. Receipt.
54. Reconveyance of Mortgaged Property.
55. Release.
56. Respondentia Bond.
57. Security Bond or Mortgage Deed.
58 Settlement.
59. Share Warrants.
60. Shipping Order.
61. Surrender of Lease.
62. Transfer.
63 Transfer of Lease.
64. Trust.
65. Warrant for Goods.

CHAPTER VII.

THE TRANSFER OF PROPERTY ACT, IV OF 1882.

ABSTRACT OF THE CHAPTER.

Why this Act is quoted in the Manual.

This is so technical an Act that mention of it is introduced into this Manual with reluctance. But inasmuch as in those territories in British India where it is in force, "the chapters and sections.........which relate to contracts shall be taken as part of the Indian Contract Act" (section 4), and the relevant parts of the Act are also to be "read as supplemental" to the Registration Act, it is plainly necessary to convey some general idea of the scope of this Act, at least in so far as it affects those Acts, IX of 1872 and III of 1877.

Extent of the Act.

It now extends to the whole of British India, except (*a*) the Punjab,* (*b*) what are called "the Scheduled districts" of Bombay, and (*c*) the area in Lower Burma not included within the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon. It provides a series of special rules regulating the transfer of property, moveable and immoveable, and deals in particular with sales, mortgages, and leases of immoveable property. As officers constantly have to act on their own judgment in respect of such sales and leases (mortgages can be omitted as much less commonly requiring disposal by executive officers), it will be useful to quote the principal sections on these subjects; but the rest of the Act can be almost entirely passed over. Its last chapter is, however, important. It relates to the transfer of actionable claims, and a case could be cited in which acquaintance with the law on this point on the part of an executive officer would have prevented protracted litigation. It is simple and short.

Logical framing of the Act.

The Act is logically framed. It begins by declaring a general rule as to oral transfers, and then sets out the only exceptions to that rule which are deemed

* *See* the note on page 168 regarding Cantonments in the Punjab

expedient. The rule is enacted in section 9 as follows:—

Oral transfer. 9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

The only other provisions requiring reference before turning to the chapters of this Act on sales and leases are sections 52 and 53:—

Transfer of property pending suit relating thereto. 52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specially in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and such terms as it may impose.

Fraudulent transfer. 53. Every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

Utility of these sections. NOTE.—These sections, it will be noticed, place large and valuable restrictions on the common practice of evading liability under impending decrees of the Civil Courts by the device of making over the debtor's property to third parties. Knowledge of this rule of law may prove of great use to executive officers, who may by its means be enabled to frustrate fraudulent action of this sort which they hay have reason to suspect will otherwise be attempted.*

OF SALES OF IMMOVEABLE PROPERTY.

"Sale" defined. 54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

* *See* Chapter IX, Form No. 23.

[*] *Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Sale how made.

[*] *In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

Contract for sale.

It does not of itself create any interest in or charge on such property.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

Right and liabilities of buyer and seller.

(1) The seller is bound—

(*a*) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(*b*) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(*c*) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(*d*) on payment or tender of the amount due in respect of the price to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents;

* *See* Note 1 on page 168, *infra*

(*f*) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;

(*g*) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same;

provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered, or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transfree as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

provided that (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (*b*) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (*a*) the seller, and in case (*b*) the buyer of the lot of greatest value, is bound upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(*a*) to the rents and profits of the property till the ownership thereof passes to the buyer;

(*b*) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound—

(*a*) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(*b*) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the person entitled thereto;

(*c*) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(*d*) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(*a*) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(*b*) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (*a*), and paragraph (5), clause (*a*), is fraudulent.

Special extent of parts of section 54.

NOTES.—1. It is important to bear in mind that the paragraphs marked [*] in section 54 are in force in every cantonment in British India, even in the Punjab—see Act XIII of 1889, section 32 (1).

The two exceptions here enacted to oral transfer.

2. It will be noticed that two exceptions are enacted to the general rule under which, save as otherwise provided, all oral transfers are valid, *viz.*, (*a*) as to tangible immoveable property worth Rs. 100 or more, and (*b*) as to all intangible things. An actionable claim is such a thing.

Section 54, paragraph 3, not exhaustive.

3. The third paragraph of section 54 is not meant to be "exhaustive," *i.e.*, *to enumerate the only ways in* which the property can be transferred. Were this the meaning, the wording would be, as in the second paragraph, "can be made only," *et cetera.*

Section 55 leaves an option to parties.

4. It is material to bear in mind that section 55 does not purport to absolutely bind buyers and sellers, but, on the contrary, expressly leaves it open to them to contract otherwise. The section furnishes a very useful "statutory" set of conditions, which, so far as applicable to the property sold, will govern every sale of immoveable property of whatever value, unless the parties see fit to make other terms. It is therefore very necessary that all officers who may have occasion to buy or to sell such property for Government shall thoroughly understand the conditions *which will be applicable by mere force of law unless expressly negatived.* Even in the Punjab, where this Act is not yet generally in force, the Courts commonly give effect to these sections by adopting their provisions as reasonable, and by ruling that these conditions impliedly attached to sales which come before them for adjudication.

Reference to section 19 of the Contract Act.

5. Together with this section, prescribing among other matters the duties of the seller and the buyer, and (see the last paragraph of the whole section) declaring the omission of certain of those duties to be fraudulent, must be read the Exception to section 19 of the Contract Act, one of the most important of the many departures from the law of England enacted in that Act. As already explained elsewhere, the maxim underlying this Exception is that the law will

not assist those who are negligent, even against persons who have fraudulently kept silent. Officers must therefore never cease to bear in mind that our Indian law requires of all to be reasonably diligent and watchful of their own interests. The italicised words of the section, sub-section 1 (*a*), "could not *with ordinary care discover*" are virtually identical with those of the Exception to section 19 of the Contract Act, "*had the means of discovering the truth with ordinary diligence.*"

OF LEASES OF IMMOVEABLE PROPERTY.

CHAP. V. 105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lease defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and money, share, service or other thing to be so rendered is called the rent. Lessor, lessee, premium and rent defined.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy. Duration of certain leases in absence of contract or local law or usage.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property

[*]* 107 A lease of immoveable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. Leases how made.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as Rights and liabilities of lessor and lessee.

* *See* Note I on page 172, *infra*

against one another respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to property leased:—

A.—Rights and liabilities of the lessor.

(*a*) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover:

(*b*) the lessor is bound on the lessee's request to put him in possession of the property:

(*c*) the lessor shall be deemed to contract with the lessee that if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and liabilities of the lessee.

the lease any accession is
(subject to the law relat-
force) shall be deemed to

(*e*) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision:

(*f*) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor:

(*g*) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor:

(*h*) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the

earth: provided he leaves the property in the state in which he received it:

(*i*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them:

(*j*) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease:

nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee:

(*k*) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest:

(*l*) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf:

(*m*) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

(*o*) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use,

the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes:

(q) on the determination of the lease the lessee is bound to put the lessor into possession of the property.

NOTES.—1. The local extent of section 107 is identical with that of the portions of sections 54 marked [*].

2. As regards the operation of section 108, see notes 4 and 5 to section 55.

Practical value of section 108, Part B, to officers illustrated

3. Special attention will usefully be bestowed on several of the provisions of section 108, Part B. Clause (f) gives a very useful power, of which officers who have taken premises on lease for Government purposes from negligent landlords may be glad to know. It is desirable in some cases to bar the operation of clause (h). A case could be cited where the tenant of certain Government premises, for the garden of which the Government had steadily furnished water, spitefully cut down on his dismissal from the service and before vacating the premises every shrub and plant which in the course of a long tenancy he had grown on the property. The power of sub-letting provided by clause (j) may often be wisely excluded.

Determination of lease.

111. A lease of immoveable property determines—

(a) by efflux of the time limited thereby:

(b) where such time is limited conditionally on the happening of some event, by the happening of such event:

(c) where the interests of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:

(f) by implied surrender:

(g) by forfeiture; that is to say (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease:

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. *This is an implied surrender of the former lease,* and such lease determines thereupon.

112. A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting: Waiver of forfeiture.

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

113. A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting. Waiver of notice to quit.

Illustrations

(a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased The notice expires *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice The notice is waived.

(b) *A*, the lessor, gives B, the lessee, notice to quit the property leased The notice expires, and *B* remains in possession *A* gives to *B* as lessee a second notice to quit. The first notice is waived

NOTES.—1. Officers are very often embarrassed to decide what does and what does not put an end to a Examples of suits which resulted from

ignorance of the law contained in sections 111—113. lease of immoveable property. Section 111 states the law on this subject clearly, while sections 112 and 113 explain the very important point how "forfeiture" of a lease, and notices respecting leases, can be waived. Two hard-fought suits could be mentioned, which would never have been required if the officer concerned had understood the effect of "forfeiture" in one case, and of "waiver" in the other. It may be as well to explain that "waiver" means *intentional* yielding-up of a legal right. This may be done expressly, or a person's act may "have the effect" of waiver, whether he is conscious of the fact or not. This important proposition—that people can bind themselves by plain acts, even without being personally conscious of the legal import of those acts—is discussed in Chapter II relating to the Evidence Act* and in Chapter III relating to the Contract Act† at some length.

2. Other provisions of the Act as to leases are omitted for the sake of brevity, as not very often required.

Agricultural leases are apart. 3. It is important to mention that nothing in this chapter applies to leases for agricultural purposes, except as specially notified by the Local Government (section 117). One officer has suggested that the leading rules governing leases of land for agricultural purposes should also be incorporated in the Manual. This is, however, much too elaborate a subject to be compressed within the narrow limits available. Such leases need never be entered into in a hurry, and the compiler would recommend officers to obtain legal advice on the subject as occasion arises.

OF TRANSFERS OF ACTIONABLE CLAIMS.

"Actionable claim" defined. 130. A claim which the Civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary. CHAP. VIII.

Transfer of debts. 131. No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until

* See page 37.
† See page 57.

express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer.

Illustration.

A owes money to *B*, who transfer the debt to *C*. *B* then demands the debt from *A*, who, having no notice of the transfer, pays *B* The payment is valid, and *C* cannot sue *A* for the debt

132. Every such notice must be in writing, signed by the person making the transfer, or by his agent duly authorised in this behalf. Notice to be in writing signed.

133. On receiving such notice, the debtor or person in whom the property vested shall give effect to the transfer, unless where the debtor resides, or the property is situate, in a foreign country, and the title of the person in whose favour the transfer is made is not complete according to the law of such country. Debtor to give effect to transfer.

NOTES.—1. These sections may appear out of place in a Manual intended to be, above all things, simple; but a case* could be cited where, for want of knowledge of the law here plainly enacted, a high departmental official "confessed judgment" for the Secretary of State to a large amount in circumstances in which the person claiming it had no right whatever to a decree. Elaborate proceedings became necessary to get the decree set aside, and the suit was promptly dismissed. Concrete instance of result of ignorance of the law here enacted.

2. This chapter must be read in conjunction with section 62 of the Contract Act; also with section 54, second paragraph, of this Act. The debtor is entitled to ignore any transfer of his debt, unless and until the law on the subject is strictly complied with, so as to render the transfer complete. This is obviously just, for otherwise he would never be safe from a fresh demand by his original creditor, even after he had fully satisfied that of the "assignee." The point will be further alluded to elsewhere. Other enactments to be read in conjunction with these.

3 It has been asked whether an Executive Engi- Right of creditors to

*Mehtab Singh's case, alluded to several times in the Manual; see for example page 258.

assign their claims explained.

neer is bound to accept a power-of-attorney granted by a contractor to a person to whom he may be in debt. If it be intended to ask whether a validly executed and served notice of assignment of a debt is binding on the debtor, the reply is in the affirmative. There could not be a better vindication of the admission of extracts from Act IV of 1882 into the Manual (a few officers think these extracts unnecessary) than this most pertinent enquiry. It is a contingency that may befall any officer any day, whether he likes it or not. If he does not know the law enacted in the Transfer of Property Act, what is he to do? One officer imagines that "the Government forms in use for contracts should give all the necessary information." The compiler would be glad to know where these forms provide instructions as to questions of assignment of debts.

CHAPTER VIII.

GENERAL NOTES ON THE SUBJECT OF CONTRACTS AND CONTRACTORS.

BRIEF ABSTRACT, *(FOR THE USE OF VERY JUNIOR OFFICERS ONLY* [illegible] IS, OF THE MATT[illegible] PUT IN THE SIMP[illegible] AND WORDS THE [illegible]

Paras.

1. Let us deal with the subject in the order of time, and see what you should keep in mind, in all cases whatsoever, *before* contracting, *in* contracting, *during* a contract, at the *end* of a contract, and in *stating a case* for advice if you fall out with the contractor · and let us see also what *general principles* ought to guide you in dealing with these people . . 1—3

HEAD I.—MATTERS TO BE REMEMBERED BEFORE, AND WHEN, CONTRACTING.

2. You can easily see that it is no use to give a contract that is beyond your powers. You are a mere agent, and if you go outside your authority you may have your action repudiated and be held responsible yourself for the consequences You should carefully study Chapter X of the Contract Act; and, in order to find out what powers you have, you should refer to Appendices A and C of Part I of this Manual. Be certain that the proposed contract is within your powers both as to *kind* and *amount*, and that the Secretary of State is clearly shown as the contracting party, and not any other officer . . . . 4—18 HEAD I, SUB-HEAD (1).

3. Having made sure of your own powers, next consider the proposed contractor's powers. What is the use of contracting with a man who either has no legal power to bind himself, or no authority to bind those for whom he professes to act? Let us sub-divide the subject HEAD I, SUB-HEAD (2). C

If he proposes to contract on his own behalf,—satisfy yourself that, so far as you can ascertain, the man is of full age and sound in mind: legally free to make the proposed agreement, *i e.*, not disqualified from contracting by any law to which he is subject: and lastly, that if you do have to sue him, he will not be able to defy the Court; *e.g.*, be

able to show that the Court has no power to try a claim against him. It is obviously useless to deal with a person who can for any of the above reasons snap his fingers at you in Court. Chapter VIII, paragraphs 20—26, will tell you precisely who can do so . Paras. 19—26

Next, if he proposes to contract as someone else's agent, your knowledge of Chapter X of the Contract Act will again come in useful. These few following remarks assume that you have mastered it. First, then, has the man ever really received the authority that he claims? Are you sure that it has been given in legal form? Make him produce his power-of-attorney and examine it closely, as elsewhere advised.* If the man merely says he has authority because he is a partner or holds some other legal capacity entitling him to act, are you satisfied that he *is* what he asserts himself to be, and also that, if so, this mere fact empowers him to act? Then, again, granting that the man has powers of some sort, are you sure that these powers include the one that he proposes to exercise? Finally, are you convinced that his powers have not come to an end? Agency ends in many ways, as section 201 of the Contract Act explains.† It may be here explained that contractors are always entitled to appoint agents to receive payments (unless they have expressly agreed to the contrary), but they are *not* entitled as a matter of course to hand over to agents the management of their work. The latter point is governed by section 40 of the Contract Act, which you should learn by heart . . . . 27—34

HEAD 1, SUB-HEAD (3). 4. Your next problem is to decide whether the would-be contractor is a really suitable man for the job. Beware of extraordinarily low tenders. They rarely come to any good. As to the man's knowledge and experience, he will probably produce certificates. Make sure that they belong and refer to him: they are often traded in. If they are in favour of a firm, make sure that the partners themselves who earned them are to do the work. (Petty firms are best left severely alone.) Are they as to similar work? Do they relate

* At page 205 of this Manual
† See page 124 of this Manual.

Paras.

to the man's last job, or are they quite unreliable as relating to work done many years ago? You should test *several* of his recent performances, not the last alone. Finally, keep his testimonials safely: they may be very useful later on. Next, is the man's character good? If even once a year you contrive, by carefully enquiring on this point, to save yourself from giving a job to a scoundrel, you will gain immensely. There is no more hateful business than having to work up a case for Court. You should next investigate the man's command of funds and of labour. The moment that a contractor's labourers get into serious arrears, trouble will ensue. Of two men otherwise equal, choose him who seems most likely to pay his men fairly and punctually, and who has the best hold on the labour market. Lastly, pay due attention to the state of his health and other engagements, if he is to run the contract in person. No one can be in two places at once. If you afterwards find that the contractor has tried to do so, this is no excuse for his failing to perform his agreement with you . . . . 35—47

5. Having decided that the individual is eligible, leave no stone unturned to ensure that he clearly understands every condition of the proposed agreement Err, if at all, on the side of needless precision. Remember that the vile ingenuity of a dishonest lawyer can pervert language to an incredible extent. It is his trade. Checkmate this to the uttermost. Prevention is better than cure. Secure *proof* that the contractor had every single clause explained to him in his own tongue and admitted that he understood them all. As to the words used, you will find, further on in this abstract, a few more hints . . 48—49 HEAD I, SUB-HEAD (4).

6. Now test the legality of the proposed agreement, with the aid of what you have learnt from Chapters II—VII. Take care that neither the "consideration" nor the "object" of it is unlawful. Steer clear of agreements declared by law to be void (*e.g.*, one precluding the contractor from appealing to the Courts, beyond what is allowed by the two Exceptions to section 28 of the Contract HEAD I, SUB-HEAD (5).

Act). Then, as to its form,—does the law require it to be in writing, or registered, or executed or authenticated in a particular way, or stamped? If so, see that the law is satisfied. The knowledge of law to be derived from Chapters II—VII is indispensable here. Public Works Department agreements are exempt from stamp-duty, but not those of local bodies like Municipalities. Powers-of-attorney need a stamp—see Article 48, Schedule I, of the Stamp Act, in Part II of the Manual. The rule may be broadly stated to be that there must be a stamp of one rupee for each person authorized to act as a general agent, with a minimum stamp of five rupees . . . . Paras. 50—55

HEAD I, SUB-HEAD (6). 7. Assuming the bare legality of the proposed agreement, it is most important to make sure that its provisions are also wise and appropriate. "Nothing should be allowed to appear in any part of a contract merely for form's sake, or which certainly would not be enforced if occasion arose." Be sure that the terms are just and reasonable throughout. Never attempt to grind a contractor. If you gain in one way you will infallibly lose, and lose more, in another. The maxim "cheap and nasty" applies. The contractor must live. Be sure, too, that not only the *average* of the various rates allowed is fair, but also that every single one is fair. Progressive rates are encouraging. Provide, so far as possible for all likely contingencies, running in your mind over every stage of the work. Exclude inconvenient local customs. Stipulate most carefully for periodical measurements and acknowledgments of their correctness. Undoubtedly reserve power to end the contract on the occasion of bad work or progress: in some cases (for example, that of an unknown contractor tried for the first time) it is expedient to reserve power to end the contract without stating any cause whatever. Invariably insert an arbitration clause, and enforce it too. You will thus wholly checkmate the lawyers and keep your disputes out of Court. To habitually compromise claims is nothing but cowardice. You will see later on that you are

advised to be ever just and liberal; but you are bound to come across plausible scoundrels who will do their level best to swindle you. To yield one iota to such men is unworthy of your position. Never fail to provide—in contracts of any importance, that is to say—that all complaints, notices, etc., between the parties must be *written*. 'Black on white' is your golden rule. Dishonest lawyers detest good, clear documentary evidence as much as Mephistopheles hates the cross. Learn by heart the rule printed in italics on page 231 of the Manual. There is no more fatal delusion than the idea that "you are safe so long as you keep off paper" . . . Paras. 56—70

8. Now for a few words as to the *language* of the agreement. Remember, no ambiguity evident on the face of it can afterwards be filled up. The agreement must speak for itself. Follow two principles: (1) omit nothing material; (2) whatever you include, express it so clearly as to be beyond the reach of perversion. It is to be hoped that, ere long, the promulgation of a set of standard conditions will vastly simplify the task of framing contracts. For the present, officers must do their best, and it is well to remind them that, in the case of illiterate contractors, simplicity and brevity are most necessary, "provided that simplicity is not allowed to degenerate into carelessness" The chief rule to remember is this: *never sacrifice clearness to any other consideration.* Avoid vague generalities; and always express quantities in words as well as in figures . 71—79 HEAD I, SUB-HEAD (7).

9. Your last precaution before entering on legal liabilities is to *have the terms on paper*, save in exceptional cases, *before the contractor moves a finger towards performance* Except where the law provides otherwise, oral agreements are just as binding as written ones, so do not imagine that you can repudiate an oral one at will. Signature is not necessary to the validity of a written one, unless the law specially requires it but the absence of his signature may give the contractor the opportunity of denying that he had finally concluded the contract. Where an agreement covers more than one sheet, sign each. Initial every correction Never erase. Make HEAD I, SUB-HEAD (8).

all corrections in red ink, leaving the original entry still legible. After a contractor has signed, he can still draw back while the agreement remains not "accepted" by Government, but not afterwards. Paras.

10. If you do decide to contract verbally (feeling satisfied that you will thereby act legally), be sure to do so in the presence of a reliable witness. At the very time, make a memorandum of the terms agreed on. Take every possible precaution to ensure that you and the contractor are wholly at one on all points. Do not forget that the law itself, unless negatived, makes many conditions for you in certain cases . . . . 80—84

HEAD I, SUB-HEAD (9). 11. Now that you have contracted, your final care should be to put the proofs of what is agreed beyond risk of loss, forgery, and so on. Always remember that evidence which cannot be produced in the hour of need might as well not exist. Beware of every cause which may lead to this result,—mere mislaying,—fraudulent alteration,—theft,—substitution, and so on. Every one of these remarks applies equally to samples, whether they be of the quality agreed on, or samples kept as proof of bad material tendered and rejected. As a rule, never contract for *materials* by sample alone, but always by specification and, if necessary, by sample as well.

HEAD II.—MATTERS OF IMPORTANCE DURING THE PERFORMANCE OF A CONTRACT.

HEAD II, SUB HEAD (1). 12. We will now assume that the contract is placed, and performance has begun. What hints may prove useful to you during the course of it. Never for a moment let yourself forget the value of *contemporary record*. However smooth the current seems at first, there may be rocks ahead. Every contract has within it the possibility of a future law-suit and endless possibilities of double-dealing. Steer warily, therefore, from the outset. In some form or another, visible, tangible, unambiguous proof of every material fact should be recorded as it occurs and of course should be as carefully preserved. Not only correspondence and other papers, but also material objects (*e.g.*, typical specimens of bad mate-

rial tendered), should be secured and kept safe. Use your note-book freely: it is almost as easily carried about as knowledge. In the rough-and-tumble of a law-suit,—in the supreme crisis of insolent and minatory cross-examination by an unscrupulous lawyer, expressly hired to badger you into self-contradiction,—your memoranda may, as the writer has thankfully *seen* such notes do, triumphantly bear you out and ignominiously rout your assailant. If you wish to reduce your orders to formal official shape at the office, by all means do so· but even then, a duplicate of the note written at the work and handed to the contractor will be most useful, and the writer strongly recommends the use of such a note-book Messrs. Newman & Co 's "Field memo. and Note-book" is said to be suitable. Of course if you issue an official letter from office, you must expressly say that it is in supersession of the note prepared on the spot, to prevent confusion. Photography is now-a-days a most useful aid to contemporary record . Paras. 89—96

13. Always be accessible *at your office*—never at your private residence—to contractors. Encourage your Sub-divisional Officers to be so, and to show an interest in their contractors' work. See that contractors in their turn pay their labourers promptly. If they do not, and the men appeal to you, refer to the Manual, page 248, for advice as to whether you can venture to pay the men or not Don't attempt it unless the right to interfere is clear to you . . . . 97—98 HEAD II, SUB-HEAD (2).

14. Now comes a very serious question. Suppose you find it desirable to modify the contract as entered into, can this legally be done, and how? Certainly it can (see section 62 of the Contract Act), but it must be done circumspectly and in such manner as the law requires. You will find a simple example in Chapter IX, as Form No. 15. First of all, be clear that both you and the contractor are of one mind as to the meaning of the proposed modification. Next, express it in plain and unmistakable terms. Next, before you commit yourself to any modification, look round and round it and see what indirect HEAD II, SUB-HEAD (3)

effects it has on the rest of the agreement. If, for instance, you increase the quantity of work to be done, will not this involve an extension of time? Lastly, take care that you effect the change in a legal manner. Thus, you cannot orally modify a written *and registered* agreement (Proviso 4 to section 92 of the Evidence Act). And do not forget that only an officer empowered to make the contract is competent to modify it later, which is, in effect, contracting afresh. Of course, orders can be *communicated* through any subordinate . . . . Paras. 99—101

HEAD II, SUB-HEAD (4).

15. Beware of seeming by your inaction to acquiesce in a contractor's deviating from his agreement. "Silence gives consent." Forbearance is good and commendable, but never let it be liable to be perverted into acquiescence. When necessary, speak, and speak plainly, and the oftener you do so on paper and the less you say orally the better. '*Vox emissa volat.*'* It is little better for purposes of evidence than writing on the sand. The subject of acquiescence by conduct has already been discussed repeatedly in Chapters II and III 105

HEAD II, SUB-HEAD (5).

16. If the contractor breaks his agreement, what are you to do? Well, bear in mind that you have an option. His breach renders the contract voidable, not void. You can treat it as ended if you like, or you can let it continue and claim damages for the breach. But you *must* decide on your course, and communicate your intentions, promptly and clearly. Unreasonable delay will be held to bind you to let the contract continue. As a rule, it is best to end the broken contract and make a fresh start. You should at once record the state in which the man left his work. In every contract whatsoever, it should be clearly stipulated whether time is to be "of the essence" or not . . . . 106—108

HEAD II, SUB-HEAD (6)

17. If you have let the contractor build huts or other structures on Government ground, he is entitled and bound to remove them at his own expense when his contract ends. He must have reasonable time and facilities to do so, but no more; and if he fails, they can, after due notice, be removed and sold and the

* "The spoken word flies away."

cost deducted from the proceeds of the sale. On the other hand, a pure trespasser who has "squatted" on Government ground has according to English law no right to re-enter, after eviction, to remove his materials. The Indian Courts however are not so strict and the trespasser would ordinarily be allowed to remove his materials. Each case would be disposed of according to the circumstances and the equities of the case. Differences arise whether a 'kutcha' or 'pucka' structure has been erected and whether Government has stood by and allowed a substantial 'pucka' building to be erected. If there has been any acquiescence compensation may have to be paid. Beware of real or seeming acquiescence in such squatting . . . Paras. 109

18 Remember these general principles: (1) Be slow to threaten, but never threaten vainly. (2) Give the utmost possible warning before rescinding a contract; the contractor may be more unfortunate than sinning, and moreover rescission is almost invariably inconvenient to Government. (3) When a contract is broken, never forget the duty imposed on you, by the Explanation to section 73 of the Contract Act, to minimize the loss or damage by all means in your power . 110—111 HEAD II, SUB-HEAD (7).

HEAD III.—POINTS TO BE OBSERVED ON COMPLETION OF A CONTRACT.

19. Now you have reached the stage of final payment. Remember that money paid under a mistake of *law* can never be recovered. Section 72 of the Contract Act can only refer to payments under a mistake of *fact*. Be sure that you do not pay to a person unwarrantably calling himself an assignee of your true creditor. Chapter VIII of the Transfer of Property Act guides you on this subject.* If you are a railway traffic officer, see that you do not settle claims with the wrong man. If you never make a mistake on the question, you will be lucky Take legal advice on every possible occasion before paying railway claims. Be very particular as to payments to agents, partners, members of joint Hindu families, to see that the claimant is authorized to receive the money If in HEAD III, SUB-HEAD (1).

* See page 174.

doubt, take good security for refund. A *bonâ fide* claimant will probably give it: a man who knows he is not empowered to receive payment will not give it. Read the notes under section 251 of the Contract Act . Paras. 112—120

HEAD III, SUB-HEAD (2).

20. Your lent tools and stores have to be recovered or paid for. Secure clear proof, and agreement, as to the seven matters detailed at pages 233—234. The question of tools and stores should always be settled *promptly*, before the final payment, and this payment should never be retarded through delay on this or any other account. If the contractor refuses to surrender tools or plant, you cannot forcibly invade his premises: you must go to law, unless your arbitration clause enables you to coerce him or, of course, unless you have money in hand which is due to him, out of which you can cut the value of the articles . . . . 121—123

HEAD III, SUB-HEAD (3).

21. A few words have already been written as to the removal of huts and other buildings from Government ground. But you may have trouble as to materials also, *e.g.*, rejected and worthless bricks. It is a question whether a clause entitling Government to forfeit materials after the lapse of a reasonable time for their removal does not partake of the nature of a penalty and, as such, is unenforceable. In any case such a clause is quite unnecessary. Provide expressly and clearly in the agreement for the removal of material within a reasonable time and for power to Government to remove and sell the same if not so removed. You can require the contractor to give security for due clearance of the ground made over to him. If he fails to *clear it, you can sell the stuff after warning* him in writing, and hold the net proceeds at his disposal. If you have to spend money on clearing it away, you can cut the amount from his dues, or from other sums payable to him in the same character. A contractor is certainly entitled to remove and sell rejected bricks, in the absence of agreement to the contrary. Where the materials of the manufactured article are of any value in themselves, the point is a knotty one. The question is provided for as to railways by sections

55 and 56 of the Railway Act. Whatever you mean to do, express yourself clearly and decisively in this as in all else, and keep *proof* of what you say . . . . . Paras. 124—128

22. And now as to methodical pigeon-holing of the documents and other valuable proofs in the case. Of course if a dispute has arisen, you have instantly put them under lock and key. But even if you see no prospect of one, they should never be left exposed to villainy, as they may come in useful later on. They may be invaluable in other cases for reference. Often the rascalities of dishonest contractors are only discovered after final settlement. You will never regret methodically arranging, docketing, storing away, and securely guarding your papers, samples, and other producible proofs. It is a cruel thing to leave to your successor, who knows absolutely nothing of your cases, the labour of having to put the papers together as best he can, in the event of the contractor (who has perhaps carefully waited till you were out of the way) starting up with a claim. Would you like it yourself? If a claim happens to come on in your own time, you will be thankful for having your armoury in order . . . . 129—132 HEAD III, SUB-HEAD (4).

23. Your experience of the contractor has now been gained. He has done well or ill,—shown himself to be worthy of future employment or a man to avoid if possible. Now, is not this information valuable? In deciding again between this contractor and other applicants, would you not make use of it? Then why should it not be stored up for the benefit of your successors also? Would not a carefully-prepared and reliable register of the qualifications of each contractor be a real god-send to you on your joining a new and strange Division? All who have discussed the proposal approve of it. Keep it up then briefly, impartially, punctually, and you will benefit yourself and others . . . . . 133 HEAD III, SUB-HEAD (5).

24. For the same reasons, make a memorandum of experience gained during each contract. Every case has its own new features. We all find it so,—lawyers, doctors, every class of professional men. These features are speci- HEAD III, SUB-HEAD (6).

Paras.

ally looked into and worked out for the purposes of the case, and while the conclusions are fresh in our minds we can in a few moments note them down, together with the necessary references and authorities on which they rest. Experience once thus bought should be made available to all: "the snake of the same hole should never bite you twice" 134

HEAD IV.—HOW TO SEND UP A CASE FOR LEGAL ADVICE.

HEAD IV, SUB-HEAD (1). 25. Realize, to begin with, that the legal adviser knows nothing about the matter, and also that he is not an expert in your profession. Expect of him neither local, nor personal, nor technical knowledge. State everything in plain language . . . . . . 135—138

HEAD IV, SUB-HEAD (2). 26. Next, be most careful to state all relevant facts, omitting, in particular, nothing which seems to favour the other side. Legal opinions are always given 'on the facts as stated.' If you state the facts inconsistently with the evidence forwarded or which ought to have been forwarded by you, it will be very discreditable to you. Herein you will find out the practical use of your knowledge of parts of the Evidence Act 139

27. Remember that, besides being to your own advantage, it is also your bounden duty to state the whole of the facts fairly 140

28. When in doubt of the relevancy of a fact, state it 141

29. Bear carefully in mind sections 19 and 20 of the Limitation Act in case you have had any correspondence with, or made any payments to, the other side. If so, the fact should invariably be mentioned . . . . . . 142—143

HEAD IV, SUB-HEAD (3). 30. If you neglect the above rules, you will either get unreliable advice, or else involve waste of time. In no event will you gain by it . 144

HEAD 4, SUB-HEAD (4). 31. Remember to carefully preserve all the evidence to which you refer. Unless producible—perhaps years later—it might as well have never existed 145

HEAD IV, SUB-HEAD (5). 32. As to the form of your reference—if you want advice on a single point only, state the point exactly, and then marshal the relevant mate-

	Paras.
rials for decision as concisely as completeness permits. If you want to set out the whole case with a view to filing or defending a suit, follow the Civil Suit Rules given in Appendix D of the Manual	146—147
33. Do not rail at your legal adviser if he asks for further information of which you do not see the relevancy. Do you gird at your doctor when he asks you questions which you don't understand?	148

Head V.—General principles wisely observed.

Head V.

34. So long as a contractor abstains from suing, be just and liberal to him, both as a matter of good conscience and of self-interest. Conduct your business in an impartial and conciliatory spirit If you acquire a bad name for the absence of such a spirit, you will never secure good contractors, and those whom you do get will raise their rates by way of insurance against injustice. Try to realize that *it is not impossible for a Government Department to be just.* Fight with all your might for the just interests of Government, but never take advantage on its behalf of an artifice or other act of which, as a private individual, you would be ashamed. And also remember that the moment a contractor has dragged you into Court, the time for concession is past. It would then be simply regarded as weakness. He has elected for war (despite, it is here assumed, the ut- [illegible] your [illegible] used [illegible] ." .	149—150

1. Just so much law having now been placed before the reader in the foregoing chapters as seems indispensable to the efficient discharge of his duties in connection with contracts, and to his easy comprehension of the remaining chapters of the Manual, it remains to undertake the much less easy task of endeavouring to assist him by some general notes suggested by experience as likely to be useful to him in the disposal of those legal matters which perforce must be managed by him without legal aid. The fol-

lowing remarks are in one sense of universal application. No matter what the particular contract concerned may be—whether a "petty" contract, a "lump sum" contract, a "schedule" contract, or any other sort—attention will, it is believed, usefully be paid to such points as those discussed in this chapter.

2. The subject divides itself naturally under the following main heads:—

I.—Matters to be considered before entering into a contract with any person, and the correct procedure in contracting with him.

II.—Matters of importance during the performance of a contract.

III.—Points to be observed on completion of a contract.

IV.—How to prepare and send up a case for legal advice at any stage if a dispute occurs.

V.—General principles which it is desirable to observe in dealing with contractors.

3. It is proposed to deal with each of these heads in turn, and it is hoped that officers will find that the remarks submitted are all *practical* and *useful* for every-day observance: indeed, as already said, they rest for the most part on actual experience, which has shown that no such matters can with prudence be disregarded, especially in times when, excepting some remote parts of India, it may almost be asserted that every dishonest contractor has a hungry lawyer at his elbow, ready and anxious to foment disputes which may result in litigation and fees, or to detect legal flaws which may enable the contractor to evade his fair liabilities and to share the gain with his legal adviser. Illustrations will be chosen here and there from concrete cases.

It will be found that a very small number will need to be indented on to supply all the instances that are necessary, so numerous are mistakes in such matters.

HEAD I.—MATTERS TO BE CONSIDERED BEFORE ENTERING INTO A CONTRACT WITH ANY PERSON, AND THE CORRECT PROCEDURE IN CONTRACTING WITH HIM.

SUB-HEAD OF HEAD I.

4. The following sub-heads require consideration:—

(1) Is the officer concerned legally competent to contract as proposed?

(2) Is the proposed contractor legally competent to so contract?

(3) Is the contractor in all respects a suitable person?

(4) Do both sides clearly understand each other?

(5) Is the proposed agreement one which is in all respects legal?

(6) Are the provisions of the proposed agreement wise and appropriate?

(7) Are the provisions of the proposed agreement expressed in suitable words?

(8) Are the provisions of the agreement (so far as practical exigencies permit) embodied in writing in a valid legal manner before performance commences? and

(9) Is safe custody of the instrument or instruments of agreement and of all documents and other things material to it or them clearly assured?

5. Each of these sub-heads will now be discussed in turn, and a few miscellaneous remarks will then conclude this part of the subject.

(I) POWERS OF OFFICERS TO CONTRACT.

HEAD I, SUB-HEAD (1): Brief note on public agents under the East India Company and the Crown in India. Power to enter into contracts.

6. Government officers are agents, and can properly contract for Government only as such, and not as principals. Before India was taken over by the Crown the officers of the East India Company contracted on behalf of that Corporation. When the East India Company ceased to exist the *power to enter into* contracts affecting India was by statute (21 and 22 Vict., cap. 106) vested in the Secretary of State in

Council and the *mode of executing* conveyances of real estate prescribed by the same statute was that such deeds should be made under the hand and seals of three members of the Council. Inasmuch as it was considered that these powers did not authorise Local Governments in India and officers entrusted with the charge of provinces or districts (*i.e.*, areas, and not as usually understood) in India to enter into and execute contracts on behalf of the Secretary of State in Council and doubts had arisen as to the proper *mode* of execution, a further Statute, the Government of India Act, 1859 (22 and 23 Vict., cap. 41), was passed to clear up these points. By this Statute (section 1) the *power of contracting* as regards contracts entered into in India was delegated to the Governor General of India in Council and to the heads of Local Governments and Administrations and is to be exercised "subject to such provisions or restrictions as the Secretary of State in Council shall from time to time prescribe." Under this provision the Secretary of State for India in Council has prescribed certain statutory rules regulating the exercise of the powers conferred on authorities in India. Further reference to these statutory rules, which are given in Appendix B to this Manual, is unnecessary.

Mode of executing instruments.

7. Regarding the mode of framing and executing instruments evidencing contracts, section 2 of the same statute provides that such instruments are to run in the name of the "Secretary of State in Council" and may be executed on behalf of the Secretary of State in Council *by or by order* of the authority empowered to contract. Finally by the East India Contract Act, 1870 (33 and 34 Vict., cap. 59), power was given (section 2) for the Governor General by Resolution in Council from time to time to *vary the form* of execution prescribed by the Act of 1859, for contracts and other instruments and also to empower Local Governments and Administrations as to him might seem expedient to vary the form of execution within the limits of their local jurisdiction. Under this power the Governor General in Council has issued various Resolutions, the latest, and that now in force, is given in Appendix A of this Manual.

8. The subject as to the making of contracts and the execution of instruments evidencing contracts may be summarised as follows:—The power to make contracts is limited to the Government of India and to *Local Governments and Administrations* (section 1 of Act of 1859). The power, under proper orders, to sign instruments evidencing contracts, duly sanctioned by competent authority may be exercised by the Secretaries to the several Governments and Administrations and, as to contracts mentioned in the Resolutions of the Government of India (Appendix A), by the officers specified in those Resolutions (section 2 of Act of 1859). Such instruments should run in the name of "the Secretary of State in Council" (section 2, Act of 1859) and the statutory rules (Appendix B) must be complied with. It does not follow that because officers may safely sign the class of deed or contract mentioned in the Resolutions of the Government of India as being within their authority, they possess the *power* to enter into the contract of which such deed is evidence without the express approval and sanction of the Government concerned. A *reference to the Resolutions in Appendix A will show* at a glance who is authorised to sign any particular kind of deed or instrument. Summary.

9. The Resolutions do not all purport to place pecuniary limits on the powers of officers; but such limits are imposed by the Public Works Department Code, which is a published document accessible to all, and with the provisions of which it has been judicially ruled that the public are bound, and must be deemed, to be acquainted (a). The ruling is, however, an old one, and it would be very advantageous to place the whole question *de novo* on an unambiguous footing. The law of England and of America has conclusively recognised a very material distinction between private and public agents as regards their authority to bind their principals. Whereas the act of a private agent binds his employer if it be within either his real or his apparent authority (*i.e.*, within such powers as his

(a) 17 W. R., 498.

employer has *actually* delegated to him, or has reasonably caused to *appear* to be so delegated), on the contrary, according to English and American law, the act of a Government officer binds the Government only when he is acting within the limits of his *actual* authority, or, if he exceed that authority, when the Government in fact or in law, directly or by implication, "ratifies" that act. The reason for the distinction will be found lower down in the passage quoted from Mr. Justice Story's great work on Agency. The Indian Contract Act, IX of 1872, is entirely silent as to this distinction; but it is one which has been recognised (before Act IX of 1872 was passed) by the highest Indian judicial authority, the Privy Council (*a*), and it is submitted that the principle on which it rests is so universal and so reasonable that it ought to be recognized by the law of British India. "Indeed," says Story, one of the greatest authorities on this branch of the law, "this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake, or rashness and indiscretion of their agents. And there is no hardship in requiring from private persons dealing with public officers the duty of inquiry as to their real or apparent power and authority to bind the Government." There is however no ruling on the point under Act IX of 1872, and the question is at present a doubtful one at best. It therefore behoves officers to be extremely careful not to exceed the limits of authority delegated to them, and to remember that if they do so, and the Government declines to ratify their act, they may possibly themselves be held personally liable under the contract. For the same reason all contracts for Government should be distinctly expressed to be made on behalf of the Secretary of State for India in Council. It ought to be superfluous to mention the benefits resulting from clearly expressing this fact. No room is then left to a contractor for mistaking the party with whom he is dealing. He is then distinctly bound to ascertain the extent of the officer's powers with whom he is negotiat-

Limits of their authority to be carefully remembered by officers.

(*a*) 8 Moo I. A 529.

ing and to know whom to sue in the event of a dispute. It would be incredible, were it not an actual fact, that suits are very frequently instituted against individual officers in respect of contracts entered into by them as public agents, and upon which they are not personally liable. If such blunders must continue to occur, no excuse should be possible for them so far as the form of the contract is concerned; and it is the duty of every officer when contracting to attend to this point.

Matters to be borne in mind

10. The matters, then, needing careful notice in this connection include the following:—

(a) Is the proposed contract of a *kind* which the officer is authorised to enter into?

(b) Is it within his competence in *amount*?

(c) Does the contractor clearly understand, and do the instruments of contract clearly express, that the agreement is entered into by him *with Government* and not with the individual officer concerned?

Point (a).

11. As regards (a), this depends with regard to the execution or signing of the contract deed on the terms of the Resolution in Council empowering the officer in question to contract for Government.* The power to enter into the contract will depend on the approval and sanction of the Government concerned.

12. In reply to an enquiry, it may be explained that the word "kind" here used means 'of a description specified in the Resolution empowering the officer to execute.' For example, the Director General of Telegraphs has no power to execute contracts save for works and other matters *in the Telegraph Department*. Officers' powers are expressly confined to the concerns of the branch to which they respectively belong.

Point (b).

13. As regards (b), this depends on the official position of the officer and on the question whether the Government has seen fit to restrict his powers to certain pecuniary limits.† It will be perceived from Appendix B how rigidly restrictions bind Public Works Department Officers.

* See Appendix A.
† See Appendix C.

Point (c).

14. As regards (c), the main point is to be certain that the language of the contract is unequivocal. Every effort should, of course, be made to render the contractor personally aware of this as of all other material facts; but the principle has been explained already in the comments on the Evidence Act and the Contract Act that it is sufficient in law if words are used which *have the effect of* conveying the desired meaning.

Non-liability of Government beyond officers' powers discussed.

15. The opinion seems to be widely held that the non-liability of Government where an officer exceeds his powers is not generally understood. It is suggested that it would be well to set this plainly forth in the "standard conditions" hereafter referred to (page 233), and that officers should be very distinctly warned by Government of the consequences of going beyond their authority. One officer enquires whether, on discovering that an Assistant Engineer has so acted, the Executive Engineer can repudiate what has been done. Of course he not only can but is in duty bound to do so, unless he considers the agreement to be beneficial to Government. In that case, if its extent be within his own powers, his right course (subject to section 200 of the Contract Act) is to ratify it—which ratification validates it from its commencement (section 196 of the Contract Act): if its extent be beyond his powers, he should submit it to the proper authority for ratification or repudiation as may be deemed expedient.

Proper course for superior officer on discovering a contract by subordinate in excess of powers.

Powers of [illegible]

16. Another officer observes that the whole question [illegible]ers of Sub-divisional Officers and their [illegible] dealing with contractors appears to [illegible] exposition in the Manual. The subject is simple enough. As Government Resolutions under the statute quoted at page 193 and the Public Works Department Code, Vol. I, Chapter VIII, paragraph 900, at present stand, no person, under the rank of Executive Engineer, can execute a contract or accept any tender, or make a contract, for Public Works. Nor can any such person on his own authority *modify* or *waive performance of* any such contract. The Executive Engineer has no right to delegate his

powers. It is thus clear that the subordinates of the Executive Engineer have no authority to bind the Government. They can of course be employed to communicate the Executive Engineer's decisions, "by order"; but in this, as in all else, they can only carry out his instructions in the capacity of assistants, acting, so to speak, merely as the mouth, the eyes, and the ears of their superior officer. This position is by no means necessarily subversive of the subordinate's influence with contractors. True, they can always appeal over his head to the Executive Engineer; but the latter has it in his power to pretty quickly sicken contractors who complain without cause, by not only upholding his assistant's recommendations, but by also making things unpleasant for the contractors. A wise Executive Engineer will invariably uphold his subordinates, if only for his own sake, so far as he can justly do so. Their true position.

17. It may be added that the absence of power to delegate authority to subordinates is not confined to Executive Engineers. No Government officer whatever, of however exalted a rank, has a right to delegate powers vested in himself alone by statute. The Governor-General can only do this under the special authority of section 2 of the statute, 33 and 34 Vict., cap. 59. No officer can delegate powers vested in himself alone.

18. In reply to another enquiry, it may be explained that, while acceptance by an officer of a tender for a work exceeding his powers of contracting does indubitably render the agreement voidable as against the Government, on the other hand his disobeying departmental and unpublished orders (*e.g.*, his disobeying such an order prohibiting the use of 'surkhee' in mortar, by accepting a tender specifying that 'surkhee' is to be used) will certainly not invalidate the agreement as against the Government. The principle is that the public are, on the one hand, clearly bound by duly published and duly adhered to limitations on the powers of officers, but, on the other hand, the public are not bound by such limitations of which they have no means of knowledge, privately imposed on the exercise of powers publicly conferred. Result of departmental disobedience of an officer on contract *Nil.*

(2) Power of the contractor to contract as proposed.

Head I, Sub-head (2).

Great importance of this point explained.

19. *This question is obviously one of the first importance.* In nothing more directly than in contracting does the maxim *respice finem** apply. The regrettable possibility that it may eventually become necessary to appeal to the law to coerce the contractor should never for a moment be lost sight of; and nothing tends more cogently to obviate the need for this course than knowledge on the part of the contractor and his legal adviser that the contract is thoroughly legal and binding, and can be enforced in Court or by *arbitration to the letter if necessary.* Now, the very foundation of validity is this, that the contractor is a person legally competent to undertake, whether for himself or (if he professes to act on behalf of other persons) for his principals, the obligations set forth. *It is unnecessary to repeat in this place what has already been reprinted in Chapter III from Act IX of 1872 as regards the legal effect of minority, the limitations on the powers of agents and of partners, and so on; but it may be useful to briefly summarize the chief points to be attended to in deciding as to the legal competence of the would-be contractor to enter into an agreement enforceable by law, whether he proposes to contract—*

(A) as a principal, or

(B) as an agent.

(*A*) *As a principal.*

Questions material where would-be contractor is a principal

20. The following questions are material:—

(*a*) Is he of full age?

(*b*) Is he of sound mind?

(*c*) Is he "disqualified from contracting by any law to which he is subject" (section 11 of the Contract Act)?

(*d*) Is he a person against whom, for any reason other than minority, insanity, or dis-

* "Look to the end."

ability, an agreement could not be enforced?

Of each of these matters in order :—

21. (*a*) *Is he of full age*?—The age of majority for persons domiciled in British India, with certain exceptions, is 18. An agreement entered into by a minor is absolutely void and cannot be ratified at majority—see notes under section 12 of the Contract Act. Act IX of 1875 is the Act regulating the age of majority of persons domiciled in British India. In the case of other European British minors, the age of majority is 18 where Act XIII of 1874 is in force. Age of majority.

22. (*b*) *Is he of sound mind*?—Section 12 of the Contract Act explains this phrase clearly. Where there is the slightest doubt on the subject, no offer to contract should under any circumstances be entertained. Sound mind.

23. (*c*) *Is he "disqualified from contracting by any law to which he is subject" (section 11 of the Contract Act)*?—An example of such disqualification is furnished by the common condition of Government service which prohibits Government servants from trading. That condition is enforceable at law, and if a person fraudulently suppressed the fact of his being in the public service and entered into an agreement with Government, proof of it would be a good defence to any action brought by him under the agreement. A case actually occurred some years ago where, in order to get over the disability in question, personation had been resorted to. The fraud was, however, discovered; the real contractor's disability was pleaded by Government, and the suit was promptly dismissed. Another common example of disability is furnished by the particular personal law to which the proposer is liable, *e.g.*, the disabilities of married women, of members of Hindu joint-families or of village-communities, and so on. A very serious recent example of the danger of failing to verify the legal competence of individuals to contract, whether as principals or as agents, will be found *infra* under sub-division B (agency) at page 202; but the same result exactly would have ensued if the vendors of the land in question Legal disqualification.

had represented it as exclusively their own. Perhaps the present sub-division (A) may be also illustrated, although not perfectly, by section 108 of the Contract Act. That section is a great advance on the law of England (which is complicated by an irrelevant consideration as to 'market overt'), and it is subject only to three clearly stated and reasonable exceptions. Section 108 lays down, subject only to these exceptions, an absolute rule that "no seller can give to the buyer of goods a better title to those goods than he has himself." It is therefore essential in contracting as to goods to make sure that the intending seller is legally competent to sell them.

Independence of proposed party.

24. (*d*) *Is he a person against whom, for any reason other than minority, insanity, or disability, an agreement could not be enforced?*—The recent suit for damages for breach of promise of marriage instituted in England against the Sultan of Johore aptly illustrates this point. For reasons of State, certain sovereign princes are exempt, absolutely or within specified limitations, from the jurisdiction of the Civil Courts, so that within the scope of their immunity no redress can be got against them if they commit a breach of contract. It appears from the late judgment in appeal, pronounced by the English Courts in the Johore case, that even if the sovereign has fraudulently described himself as another person, or has expressly agreed to waive his exemption, he can still decline to submit to the jurisdiction of the Court and defeat any suit brought against him. Many native princes in India are privileged in like manner, so that the Johore case is very much in point. Caution in commercial transactions with them is plainly necessary. This subject is dealt with by section 86 of the Code of Civil Procedure, and is not to be lost sight of in deciding upon the competence of an individual to bind himself at law. The Government is in no better position against privileged persons of this kind than any private individual is.

The rule binds the Government like any body else.

How officers are to find out the foregoing disabilities.

25. It has been asked how an officer can ascertain that the intending contractor is not disqualified by minority, insanity, disability, or other circumstances.

and how it can be found out whether he possesses the requisite capital. Well, in the first place, the officer must use his own good sense. As regards personal attributes,—it is always desirable to *see* an individual who offers himself as a contractor, before closing with him. If, on inspection, the man's full age or sanity seem at all doubtful, it is best to have nothing to do with him. As to other disabilities, at least the precaution can be taken of questioning the applicant. If he falsely denies a disability subsequently detected (*e.g.*, the fact of his being a Government servant), this will amount to fraud and will enable the Government to repudiate the agreement as above explained. As to the man's capital, it does not seem difficult to require him to give satisfactory proof and, if necessary, security on the subject. The taking of good sound security is an excellent resource applicable to almost every difficulty. Adequate money compensation will make up for most defections by contractors.

Who the persons under reference are.

26. It is impossible to furnish, as one officer desires, a list of persons against whom, for any reason other than minority, insanity, or disability, an agreement cannot be enforced. Speaking broadly, the persons in question are those who, whether through privilege (as to these, see sections 83 to 87 of the Code of Civil Procedure), or through absence of their person and property from British India, are beyond the reach of the Civil Courts It is not of much use to have a good cause of action against an independent prince or against a resident, say of Chinese Tartary, who owns nothing in British India that can be seized.

(*B*) *As an agent.*

Questions material where the would-be contractor is an agent already discussed elsewhere.

27. This is a widely ramifying subject of very serious importance. A good deal bearing upon it has already been said in the chapters on the Contract Act, the Evidence Act, the Registration Act, and the Limitation Act; and it is a question which aptly illustrates the real value of a knowledge of parts of these Acts to executive officers. In this chapter a few general remarks, and one or two illustrations from concrete cases of actual occurrence, may suffice to warn

officers of the imperative need of verifying the extent of a professed agent's powers as such before committing the Government to any agreement with his principals, or recognizing in any other way his authority to contract with Government.

Chief points to attend to.

28. When a person who claims to be another's agent proposes to bind that other, at least the following points must be attended to:—

(*a*) Has he received authority from the person (and, if the principals consist of several persons, from every one of them) whom he proposes to represent and to bind by his action?

(*b*) If the law demands any particular form of authority, does he possess it?

(*c*) If his alleged authority is not express, but merely implied from an alleged legal capacity, (1) does he hold that capacity, and (2) does that capacity confer any such authority?

(*d*) Is the proposed act within the limits of such authority as he holds?

(*e*) Is his authority still subsisting?

A few remarks on the above points are appended:—

Has he received his alleged authority?

29. *Point* (*a*) *Has he received authority from all the persons whom he proposes to represent and to bind by his action?*—The case of Malik Bassu *versus* Bryan (P. R. No. 191 of 1889), decided by the Punjab Chief Court and already referred to above, illustrates the great danger of overlooking this point. In that case a plot of ground at Lahore was bought from the village headmen of the village community of Mozang, who professed to be able to give a good title binding on all the co-sharers, whose agents they certainly are for many purposes. It was, however, held that the headmen had exceeded their authority in selling the common land, and the sale was

set aside. Dishonest principals will readily avail themselves of any flaw of this sort in their agent's power-of-attorney in order to evade liability on an inconvenient or unremunerative contract. If the agent—as often happens—be a man of straw, 'not worth powder and shot,' it is evident that the Government would be without a remedy if it wished in such a case to recover damages for breach of the agreement. The subject of contracting with firms, families, and companies will be again referred to under another heading.

30. *Point* (*b*) *If the law demands any particular form of authority, does he possess it?*—Section 33 of the Registration Act, III of 1877,* affords an example of a power-of-attorney which *must* not only be in writing, but also be executed and authenticated in a particular manner. So, too, under sections 19 and 20 of the Limitation Act, IX of 1908,† great care must be taken to make sure that the act of an agent is clearly within the scope of his authority. He must be "duly authorized." It has been suggested that, if this clause (*b*) is not exhaustive, all other cases where the law requires writing should be specified. Such cases, within the ordinary duties of executive officers, not covered by the Acts quoted in the Manual are few. The compiler regrets that space will not admit of his exhausting the subject. Is it in legal form?

31. *Point* (*c*) *If his alleged authority is not express, but merely implied from an alleged legal capacity,* (*1*) *does he hold that capacity, and* (*2*) *does that capacity confer any such authority?*—The first point (1) is a mere matter of proof, but the second point (2) is an important question of law. Take As to implied authority.

* *Vide* page 137 of this Manual
† *Vide* pages 143 and 144

the case of partnership, for example. Section 21 of the Limitation Act, IX of 1908, expressly enacts that, for the purposes of limitation, "nothing in sections 19 and 20 renders one of several joint contractors, partners, executors, or mortgagees chargable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them" It is evident, then, that great care must be exercised in recognizing such a person, not specially authorized, as legally competent to bind his fellows in such matters as those of acknowledgments and part-payments.

As to the scope of agent's authority.

32. *Point (d) Is the proposed act within the limits of such authority as he holds?*—It is very important to bear in mind that it is not illegal to limit an agent's powers (precisely as Government limits those of its officers, for instance), and it is therefore most necessary to make sure that any particular act which an agent proposes to do is within the authority conferred, expressly or impliedly, on him. In many cases the defence has been set up, both by and against Government, that an agent had exceeded his powers.

Does his authority still subsist?

33. *Point (e) Is his authority still subsisting?*—This is a point liable to be overlooked, but of obvious importance. As the rule of law which makes the acts and declarations of an agent binding at all on his principal is based on the theory that he and his principal are one in law, it is evident that the rule ceases to apply when the relation of principal and agent has ceased to exist.

Contractors how far entitled to appoint agents and how far not.

34. A considerable number of officers have referred to the troublesome question of contractors' agents. This is a convenient place at which to answer the principal enquiries, not disposed of already. It may be observed generally that officers must distinguish

between the appointment, on the one hand, of an agent merely to receive and make payments or communications, and, on the other hand, the delegation to another person of responsible duties under a contract. It is quite within a contractor's legal rights (in the absence of express stipulation to the contrary in the agreement) to appoint any person he pleases to act as his representative for the formal receipt and delivery of letters, notices, etc., and also for receiving payment of moneys due to him. This in no way injures the Government, and in the case of a contractor in a large way of business may be really unavoidable. But the delegation of actual duties requiring skill or experience stands on quite a different footing. If the advice submitted in this Manual as to the careful *selection* of the contractor has been followed, his personal qualifications are of clear importance. For him (as one officer expresses it, quoting from his actual experience) to "put in any ignorant and irresponsible fellow to represent him when he wants to be absent, and often a different man each time," is virtually to neutralize the whole advantage of having selected a contractor duly qualified by his attainments to be entrusted with the work. Now, apart from express stipulation on the point in the agreement itself—and this should never be omitted—the right of the contractor to delegate his functions is regulated by section 40 of the Contract Act, above quoted at page 87 of the Manual. The "intention of the parties" should never be left in doubt; and in the present particular it is easily expressed by a simple stipulation that the contractor shall carry out the contract in person, except in so far as the Executive Engineer in charge may see fit to authorize beforehand in writing. The appointment of a contractor's agent should invariably be in writing. The matter is one upon which orders by authority would be well bestowed. Another officer asks 'what documents should a supposed agent produce to support his identity or authority? How are Executive Engineers to test the genuineness of these documents and tell if they are really all that is required by law?" As regards *authority*, a power-of-attorney duly stamped (concerning the stamp, see page 221 of the Manual) is all

Such appointments should always be in writing.

How the genuineness of appointments is to be tested.

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Such appointments should always be in writing.

How the genuineness of appointments is to be tested.

that is necessary; but in order to secure conclusive proof of execution of the power, it is quite legal to expressly stipulate in the agreement that only a *registered* power-of-attorney will be recognized. As regards *identity* of the agent, it is usually deemed sufficient proof for practical purposes to test a man's identity by comparison of a signature taken from him in person with another one of admitted genuineness, previously secured. If the contractor furnishes such a signature written upon the power-of-attorney deposited by him, there ought to be no difficulty about testing the identity of a man representing himself as his agent. If the agent's handwriting be not deemed sufficient proof of identity, and if no reasonably reliable persons can be produced who will vouch for the agent's identity, the only suggestion which the compiler can make is that the contractor be required by the agreement to deposit therewith a photograph of the agent. The compiler fears that contractors would be considerably taken aback by such a stipulation, and he cannot see any necessity in practice for such exhaustive proof of authority (*a*).

(3) IS THE CONTRACTOR IN ALL RESPECTS A SUITABLE PERSON?

HEAD I, SUB-HEAD (3). 35. The importance of this question is plain; in fact, from a practical point of view, it is a great deal more material than the technical completeness, or clearness, or legality, of the agreement as drawn can ever be. Against a man of straw, the best-drawn instrument is powerless; and a contractor destitute of the knowledge indispensable to the efficient discharge of his undertaking can by no possibility give satisfaction, however effectually he may be bound down by legal terms. On the other hand, a fair, honest, well-disposed contractor will decline to take advantage of loop-holes in his agreement, and will give effect to what he knows to be its intention. The personal qualifications of the individual are therefore highly material, and should be carefully borne in mind.

(*a*) It would be sufficient for the contractor to appear in person or send some known person to identify the agent. C.B.P.

What the Government wants to secure is, not the empty advantage of good 'causes of action' against defaulting contractors, but the punctual and efficient *performance of its contracts, with freedom from the* painful necessity to make other arrangements for the work. It is therefore of the first consequence that officers in placing their contracts shall take all reasonable precautions to make certain of the general fitness of the individuals whom they select, and shall bear in mind that the lowest tender for a work is by no means necessarily the one which should be accepted. One officer, indeed, does not hesitate to describe the lowest tender as "very seldom better than an impudent attempt to cut in at the impossible and to get a round sum down by unauthorized sub-letting."

Points requiring comment under Sub-head (3).

36. Under this sub-head, the following points require comment :—

(*a*) Is the person in question duly qualified as regards *knowledge* to do the work?

(*b*) Is he of good *character*?

(*c*) Does he possess the requisite *funds and command of labour*?

(*d*) Has he the necessary *leisure and health* to attend properly to the work?

(*e*) Does he tender in his *individual* capacity, or *for an absent principal*, or *for* a *firm*?

These points will now be discussed in turn :—

Proposed contractor's knowledge.

37. *Point* (*a*) *Is the person in question duly qualified as regards knowledge to do the work?*—Nothing can be plainer than that if competent training and experience be indispensable to satisfactory performance of an agreement and be absent, disappointment and disputes must inevitably result; while nothing is more certain than that this and other essential qualifications are at times wholly overlooked in the selection of contractors.

38. In this connection, the following suggestions may be of use :—

In the matter of certificates :—(1) *Do they*

(1) If a person tendering relies upon certificates produced, it is necessary to make sure that they belong and refer to him. Quite recently a swindler obtained

belong and refer to him? employment in the Public Works Department by virtue of a Rurki certificate which had been granted to another person, and in which the name of the true grantee had been skilfully erased. One officer remarks that "a trade* in certificates is by no means uncommon." Again, a certificate may not have been tampered with, but may relate to another person of the same name. Great care should be exercised in the giving both of certificates and of contracts to record the parentage, caste, and other useful details of the person referred to, in order to ensure easy proof of his identity. A case occurred not long ago where neglect of this precaution resulted in a whole series of payments to the wrong person on the strength of a power-of-attorney which omitted such particulars. Again, if the individual produces certificates in favour of a firm of which he professes to be the agent, and in whose behalf he applies for the contract, it is essential to make sure that the duly qualified partners of the firm are to personally perform the contract, if any weight is to be attached to the certificates A case recently happened, which it will be convenient to cite as Mulchand's case, in which a contract was given exclusively on the strength of testimonials produced in this manner; but, in the event, no partner of the firm ever even appeared on the scene, the agent grossly mismanaged matters, and the Executive Engineer concerned had to rescind the contract at great inconvenience to Government, and with the natural result of a fiercely contested law-suit, which, although successfully defended, cost the Government indirectly a large sum of money. This case furnishes numerous illustrations of the manner in which contracts should *not* be entered into or conducted, and will be frequently referred to.

Mulchand's case cited

(2) Do they relate to similar work?

(2) Next, it is material to see that the certificates refer to work of a similar kind. A person may be well qualified to contract for common earth-work, yet be altogether unfit to build a bridge.

* It has been held by the Punjab Chief Court that the use of a forged certificate in order to gain employment is fraudulent and punishable as forgery—P. R. No. 2, Criminal, 1895

(3) It is always desirable to safely preserve certificates or samples produced. In Mulchand's case it became highly important to prove that he handed to the Executive Engineer several cards which only described him as "agent for the firm of" so and so without even giving his own name, and that he submitted certain washed and cleaned specimens of kunker, up to the standard of which the work entrusted to his firm was to come. The cards and the samples were all lost in the Executive Engineer's office, and could not be proved for the defence when it stood in urgent need of them. (The matter of samples is again referred to elsewhere.) (3) Keep them safely.

(4) It is important to enquire whether the person producing the certificates has done any later work as to which he has no certificates to show. It is not at all uncommon for contractors to make a creditable beginning, expressly in order to secure a good reputation, and thereafter to wilfully trade on it. It is observed by one critic that "it is not sufficient to inquire from their immediate previous employers, but they should be looked up through several previous contracts." A case could be quoted in which a contractor in his first bill inserted a trifling error against himself, and then, fondly believing, that he had thus established a reputation for probity, committed serious inaccuracies in every one of eleven subsequent bills, all, without exception, in his own favour. This risk is not to be lost sight of in giving due weight to the fact that a contractor has served well already under other officers. (4) Do they relate to his latest job?

39. *Point (b). Is the contractor of good character?*—The labour expended in verifying the intellectual, moral, and physical fitness of applicants for contracts is well bestowed and an immediate gain to the officer concerned. To ignore these qualifications is to court disputes and disaster; and obvious though this truth may appear, even to the extent of being a profitless platitude, concrete cases could be cited in which contracts of serious magnitude have been given, and by officers of long standing, to persons whose antecedents were ascertainable with comparative ease and Proposed contractor's character.

left no doubt whatever that nothing but disappointment could be expected to result from their re-employment. If a form were prescribed for officers to fill up upon the occurrence of an important legal dispute, the first particular stated in it should be a clear and definite reply to the enquiry, 'Did you before giving this contract take any steps to satisfy yourself of the professional, moral, and physical fitness of the contractor: if so, what; and, if not, why not?' A case, which may henceforth be referred to as Jones' case, is in point, where the contract was given without any effective inquiry to a man of straw who never once set foot in the place where performance was to take place—a man whose name had already been identically used on a previous occasion, resulting in a disastrous failure and heavy loss to Government. The consequence was an extremely complicated law-suit for Rs. 57,000, only defeated by expenditure of many thousand rupees in the salaries of highly paid officers specially deputed for the purpose, or detained for lengthy periods to assist in the defence, to the serious prejudice of their duties elsewhere. In another case, already referred to as Mulchand's, the man had no sooner been defeated in his attempt to defraud the Government and to brand the Executive Engineer as perjured than he obtained fresh employment in the very next division, the officer in charge of it being unaware of his antecedents. The compiler of this Manual is happy to state that his suggestion for the institution of a register of contractors unworthy of further employment under Government has met with well-nigh universal acceptance by those consulted, and will, he trusts, be adopted forthwith. Nothing will more directly tend to keep contractors upright in their conduct than the knowledge that proscription from further service under Government must *inevitably follow the failure of any false claim* instituted by them in Court or other serious and undoubted misbehaviour.*

Jones' case cited as an example.

Black register proposed.

No practical difficulty as regards the law of libel

40. There is considerable divergence of opinion among the officers consulted, as to the best scope and form of this register. The subject is one of extreme

* The point is again touched on elsewhere : *vide* page 207 of this Manual.

importance and cannot possibly be disposed of in the Manual; but the compiler has good hope that it and other difficult questions of practice will be authoritatively settled before very long, in conformity with the views of the great majority of those who have discussed the subject. One officer, while approving of the register, asks how an Executive Engineer can without danger of a prosecution for libel refuse to deal with a contractor whom he may believe to be dishonest. The answers are numerous. First, he need not give any reasons for refusing to deal with any person. Secondly, if the contractor is particularly pressing to know the reason of his rejection, the officer's reply, communicated either orally in private or on paper by a closed letter, is not libellous, because there is no "publication." Thirdly, even if in reply to an enquiry the officer gave his reasons (which would be very unwise) in the presence of others, the communication would not be libellous unless it were false and unless "actual malice" were proved against him. The difficulty is one which with moderate prudence can never be met with in practice.

In refusing to deal with any person.

41. One objection raised against the proposed "black register" is worthy of a passing remark. It is said that the register would be useless in practice, because a proscribed contractor would at once change his name and go elsewhere. To this there are several replies. First, such a device is impossible in the case of contractors of any position worth mentioning. Secondly, if it be made a 'standard condition' of all Government contracts that the contractor shall disclose his true name and other particulars, and it be expressly provided by the same condition that the contract would not be given if it were known that the contractor was tendering under a false name, and that to deceive the representative of Government in this respect will constitute an offence punishable with six months' rigorous imprisonment, the compiler's belief is that only a very small percentage of dishonest contractors would dare to conceal their identity. Thirdly, if we are not too 'hide-bound by custom' to see utility or sense in what is doubtless novel, a system of

Questions of fraudulent change of name by contractors discussed.

recording personal descriptions, with specimen signatures (of such men as can write) attached, might be tried. Whenever a contractor's name was sent up for entry in the 'black register,' his description and specimen signature (if any) would be attached to the report. Thereafter, such a person could generally be detected by any officer who, having given him a contract and found him to be dishonest or grossly unfit, suspected him of fraud, and sent his description and a sample of his handwriting (if any) to the custodian of the 'black register' for identification. Possibly something might even be done by the aid of photography. The idea is quite crude, but perhaps something could be made of it, although to the compiler its use in this respect seems unnecessary. His suggestion to use photography for the purpose of fixing the exact state of works at a given moment has been cordially welcomed; and he sees no conclusive objection to any other workable use of such evidence, even though it be, hitherto, unheard of. A grand instance of the successful use of photography in judicial proceedings is furnished by a recent case, where the camera detected on an old deed a signature indispensable to its validity, but which had faded so utterly away as to be wholly indiscernible by the eye even when aided by a powerful magnifying glass.

The proposed contractor's resources discussed.

42. *Point (c) Does the contractor possess the requisite funds and command of labour?*—Other things being equal, preference should invariably be given to a contractor who is in a position to work on his own resources and not on borrowed capital. In a country like India, where the rate of interest is high, persons who are in the hands of money-lenders can never afford to do good work as cheaply as can those who have no interest to pay. The former *must* either work at higher rates, or do less satisfactory work, than the latter. A sound and solvent firm or individual can often afford to carry out a contract at a positive loss, for the sake of preserving a well-earned reputation, and thus securing future business: the man of straw can never do this, but will certainly evade his responsibilities when the contract proves a losing one, either by deliberately throwing up his undertaking or

by sheer inability to carry it on. Such persons invariably expect to secure their agreement at a higher rate of profit than ought to suffice, because as their eventual success is uncertain, they must make up on one contract what they lose on another in which they fail for want of funds. It may almost be regarded as an axiom that a person dependent on borrowed money, who tenders at as low a rate as would just remunerate a person of substance, has no solid intention of carrying on the work to completion. It has been remarked that persons of this class are very apt to start, when they can, on advances: to go on so long as the work remains easy; and then, as soon as trouble is encountered, to abscond, frequently leaving a serious difficulty behind them. Railway cuttings afford a common illustration of this device. Perhaps the best preventive of the difficulty under consideration is to rigorously refuse to give advances, to take sound security for performance, and to invariably reserve the power of keeping payment slightly in arrears.

43. The importance of making sure also of the contractor's command of labour is obvious. A case could be cited where the construction of a large piece of frontier road-making was entrusted to a contractor, prompt performance being most essential. It turned out that the man had no adequate supply of labour secured, and the work had to be taken from him after much valuable time had been lost and voluminous correspondence had been wasted on him. Thorough reliability in this particular is an attribute in a contractor well worth paying for. **Also his command of labour.**

44. *Point (d). Has the contractor the necessary leisure and health to attend properly to the work?*— It is always important before giving a contract to enquire into these points. Every practical person knows that, in India especially, unskilled labour must be constantly and carefully supervised. Small sub-contractors are no exception to the rule. It is absolutely essential that the contractor shall not be a person disabled either by business engagements elsewhere or by ill-health from attending to the work entrusted to him. For this reason, a provision is **His leisure and health.**

introduced into some of the standard forms of agreement binding the contractor to supervise the work either personally or by approved agent; and it has been strongly urged that a provision binding the contractor to be present on the work, in person or by an agent previously approved by the representative of Government, should be introduced into all agreements. However summarily a contract be given, this point should never be overlooked. Times without number disputes have arisen within the personal experience of the compiler of this Manual through neglect of his work on a contractor's part. This can be prevented if persons tendering for a contract be required to satisfy the officer concerned that they are in a position, both as regards their other engagements and their own health, to properly attend to it. In the heavy case for Rs. 57,000 *already alluded to, the dispute mainly originated* in the fact that the agent left on the spot to supervise the work was both professionally and physically unfit for his post and allowed the work to drift. The usual provision barring sub-letting of the contract without the previous written consent of the officer concerned is justified by the same considerations. Officers should sternly enforce that condition; and no assignment of the contract should be allowed except to a person proved to the officer's satisfaction to be duly qualified in all respects to undertake it. The small amount of trouble involved in careful attention to these points will be amply repaid by immunity from disputes and disappointments afterwards.

Unauthorized assignment should be sternly disallowed.

Question put on this subject. (1) Case of contractor entering into two distinct contracts.

45. Two very practical questions have been put, which may conveniently be dealt with here: (1) suppose a contractor enters into two distinct contracts at the same time and at or near the same place, the agreements for which make no mention each of the other,—can one contract be put an end to on just grounds without the contractor's having a claim for breach of the other? The answer is, emphatically, yes. Even if it were expressly stated in one agreement that part of the 'consideration' for it was the fact of the contractor's enjoying the advantage of holding the other contract, this fact would not exempt him from his legal duty to properly perform the other contract; and if

he broke the latter, and consequently had it rescinded, this would do him no 'injury' legally entitling him to complain, or to throw up the first-named contract. In so far as his profit under the latter is reduced, or even extinguished, he has only himself to thank. Much more, then, do separate contracts hold good independently which do not even mention each other. It would, however, be better if each agreement referred expressly to the other and declared that the two were to be wholly independent. No legal documents can be too explicit. As Thomas Carlyle said, 'mankind are mostly fools,' and you must 'play down' to the intelligence of those who are to sit in judgment upon your agreements.

(2) Case of impossibility resulting from cause independent of the contractor.

46. Question (2). Again, if performance of a contract within the stipulated period will become a physical impossibility in the event of another work (placed by Government in other hands) being behindhand, and it does get behindhand, what is the legal position of the contractor for the former work? Can he claim (*a*) to throw up the contract, (*b*) to get more time, (*c*) to escape penalties? The answer on all three points is in the affirmative. The impossibility referred to, which is beyond the contractor's control and responsibility, indubitably excuses performance. (See section 56 of the Contract Act.) Strictly speaking, the contract becomes void; but if the contractor does not care to treat it as such, and is willing to complete the work when the other indispensable work is done, he is obviously entitled to more time, and is liable to no penalties under the original agreement, so far as his blameless failure to complete the work by the prescribed date is concerned. Under certain circumstances he may be entitled to compensation for labour kept idle and it would be advisable to guard against this in the agreement.

Capacity in which the tender is made.

47. *Point (e) Does the person tendering do so in his individual capacity, or for an absent principal, or for a firm?*—This is a question of some consequence. Where a man tenders solely on his own behalf, there is an opportunity of questioning him and ascertaining whether he is a suitable person for the work or not. But where he professes to tender either as an

introduced into some of the standard forms of agreement binding the contractor to supervise the work either personally or by approved agent; and it has been strongly urged that a provision binding the contractor to be present on the work, in person or by an agent previously approved by the representative of Government, should be introduced into all agreements. However summarily a contract be given, this point should never be overlooked. Times without number disputes have arisen within the personal experience of the compiler of this Manual through neglect of his work on a contractor's part. This can be prevented if persons tendering for a contract be required to satisfy the officer concerned that they are in a position, both as regards their other engagements and their own health, to properly attend to it. In the heavy case for Rs. 57,000 already alluded to, the dispute mainly originated in the fact that the agent left on the spot to supervise the work was both professionally and physically unfit for his post and allowed the work to drift. The usual provision barring sub-letting of the contract without the previous written consent of the officer concerned is justified by the same considerations. Officers should sternly enforce that condition; and no assignment of the contract should be allowed except to a person proved to the officer's satisfaction to be duly qualified in all respects to undertake it. The small amount of trouble involved in careful attention to these points will be amply repaid by immunity from disputes and disappointments afterwards.

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Capacity in which the tender is made.

agent for an absent principal or on behalf of a firm, complications arise, which must be carefully borne in mind. The matter of his *legal authority* to bind those whom he professes to represent has already been dealt with in detail under Head I, Sub-head (2) (B), of this chapter.* Assuming that the question of authority to act is satisfactorily settled, the next question is whether the absent principal or the firm concerned is a suitable party to the proposed contract. All the considerations on this subject enumerated in this chapter should be brought to bear. Whenever possible, it is a good plan to insist on an interview with the principals or absent partners of a person tendering on their behalf. It is certain that if this precaution had been adopted in Jones' case, the contract would never have been given to the worthless individual whose name figured in it is the contractor. Speaking generally, it is not desirable to give contracts to petty "firms," and it is most necessary to debar individual contractors from introducing partners into contracts with Government except under the written consent of the officer concerned previously obtained. The great principle to be steadily borne in mind before contracting, during performance, and in finally settling up a contract, is to *steer clear of whatever may tend towards legal complications.* This principle will be again insisted on elsewhere: in this place it is sufficient to mention that much risk of embarrassment will be avoided by keeping the personality of the contractor clear and undivided.

Are the absent persons concerned suitable? Interview them, whenever possible.

Steer clear of legal complications.

(4) DO BOTH SIDES CLEARLY UNDERSTAND EACH OTHER?

HEAD I, SUB-HEAD (4). The effect of mistake.

48. In discussing this question, it will be assumed that the language selected is clear. Ambiguities of words will be specially referred to hereafter under sub-head (7). It may, however, well occur that even in the absence of any verbal ambiguity, there is a *bonâ fide* mistake on one side or other as to the legal import of the words used, or even as to the very existence of a binding agreement at all. Now, it cannot be too emphatically impressed on all officers that mistake of this

* See page 202.

kind by no means suffices necessarily to invalidate a contract. It has been clearly explained already by quoting and commenting on sections 3, 13, 20, 21, and 22 of the Contract Act to what extent alone mistake will render an agreement voidable, and the subject need not be again discussed; but it is important to use this opportunity as an illustration of the imperative necessity of all officers understanding the law on the subject if they are to contract with any reasonable prospect of legal safety. (There can be little, if any, doubt that contractors are often allowed to escape the just penalty of their defaults through the fact that the officers concerned have no clear idea where the contractor's legal liability began, and precisely how far it extended.) At the same time, as "prevention" is always "better than cure," it is obviously wise in settling the terms of a contract to leave no stone unturned in order to ensure that the opposite party does really understand distinctly from the outset the legal liabilities to which his words commit him. Just as in an Act of the Legislature clearness and precision of language are of far higher consequence than elegance of diction,—as, for example, it is much better in an Act to use the same word as often as the same sense is intended than to study style and endeavour to express the same sense in varying terms,—so it is the wiser course, when contracting, to err, if at all, on the side of needless precision,—to give the other side credit for less intelligence, less honest desire to interpret the agreement fairly, and more perverted ingenuity in the art of distorting plain words than may be really necessary, and thus to reduce to a minimum the chance of misconstruction.

Use every endeavour to prevent misunderstanding. Above all, be clear.

49. In order, then, to lessen the risk of misunderstanding, it is always expedient to make quite sure that the contractor understands what he is undertaking, and to see that all material conditions are definitely settled. This last point will be more particularly referred to further on under sub-head (8). If the contract is drawn up in English, and the contractor does not know that language, his signature is of very little practical value unless proof be easily producible that the terms of the agreement were clearly

How this object can best be attained.

explained to and understood by him. It is not sufficient even to make the man sign an acknowledgment to this effect. Such an admission is useful, but it is not conclusive. What is wanted is a note made by the officer concerned, however briefly expressed, which will enable him to swear positively that the agreement *was* read over by, or to, and *was* apparently understood by, the contractor. This is the procedure of the Courts in respect of evidence orally given and recorded at the time, and its wisdom is clear. It has repeatedly been remarked in the presence of the compiler of this Manual that Government contracts "are good enough against the Government, but they are waste paper against the contractor." This idea is undoubtedly based on the opinion that the usual contract forms are too complex for the ordinary native contractor's comprehension. If that be the case, there is all the more need, when using those forms, to overcome the difficulty, so far as may be possible, by personal explanation of them. It is not forgotten by the writer that executive officers are busy men, whose time can ill be spared for the instruction of ignorant contractors, or that emergencies do occur in which there is no time at all for framing elaborate agreements. Such cases are, however, the exception, and in no degree weaken the force of the general rule that no agreement should be entered into until it is as certain as human affairs can well be that its terms are or ought to be understood by the other party. It must be borne in mind that contractors are not ordinarily speaking very numerous, and that it is only necessary to explain matters to the same individual once. Officers who have ever undergone the labour and anxiety involved in litigation will acknowledge that a great deal of trouble at the first would have been well expended in making sure of keeping clear of the Civil Courts. It has been suggested that the duty of explaining to contractors the terms of proposed agre ments might be enjoined by a Standing Order, or be printed on all agreement forms.

Cases of exceptional urgency do not affect the general rule commended.

(5) IS THE PROPOSED AGREEMENT ONE WHICH IS IN ALL RESPECTS LEGAL?

HEAD I, SUB-HEAD (5).

50. This is a large and complex question, requir-

ing, for its right solution, knowledge of certain provisions in the various Acts of the Legislature already quoted in this Manual. Herein lies a sufficient justification for their introduction. Unless officers understand what facts would invalidate their agreements, they cannot possibly contract with safety. They must always bear in mind that the moment a dispute arises, the agreement is sure to be subjected to legal scrutiny, and that advantage will be taken of every conceivable flaw in order to evade liability or to fasten it upon the Government. In a case of recent occurrence, where the agreement had not been drawn in strict legal phraseology, no less than nine distinct defences of one sort or another were set up in order to defeat it. Every one of them, as it happens, was eventually overcome, but only after an inordinate expenditure of Judicial time.

Why the legality of agreements is so important.

A case in point.

51. The points demanding attention in this connection are as follows:—

Matters needing attention.

(*a*) Is there mutual consideration?

(*b*) Are the consideration and the object of the agreement lawful?

(*c*) Is the agreement one expressly declared by the Contract Act to be void?

(*d*) As regards the form of the agreement,—

(1) Does the law require it to be in writing?

(2) Does the law require it to be registered?

(3) Does the law require it to be executed or authenticated in a particular manner?

(4) Does the law require it to be stamped?

If so, does it satisfy the law in these respects? A few words will suffice in this place on each of these subjects—

52. As to point (*a*).—The reader is already aware that, with certain specified exceptions, agreements made without consideration are void (section 25 of the Contract Act); special attention is drawn to the notes

Point (*a*).

under sections 2 and 25 of the Contract Act which need not be repeated here.

Point (b).

53. As to point (*b*).—An agreement of which either the consideration or the object is unlawful is void (section 23). Close attention to the terms of this important section (23) is necessary. It may be thought that a public officer could never enter into an agreement contravening the law. Of course this would never be done knowingly; but the law as to consideration may be transgressed inadvertently.

Point (c).

54. As to point (*c*).—Instances of agreements specially declared to be void will be found in sections 26—30 of the Contract Act; also in section 56. Some of those cases—notably that dealt with in section 28—are of very direct importance to executive officers respecting the agreements into which they enter, and what it is necessary to say about them will be found in notes under the respective sections of the Contract Act. It is sufficient to indicate here the direct value of these sections to those for whose benefit this Manual is prepared.

Point (d), clause (1).

55. As to point (*d*), clause (1).—There are not many classes of contracts which in British India must be in writing. Under the Transfer of Property Act, certain sales and leases can only be so effected: the relevant provisions of it are quoted in Chapter VII. Certain contracts entered into by public bodies (*e.g.*, Municipal and Cantonment Committees) must, under Acts specially relating to them, be in writing. Such cases would not be urgent, and reference can be made on the point to the legal adviser of the Government. The special case of negotiable instruments may be passed over without further mention. Section 72 of the Railway Act, IX of 1890, relating to agreements limiting the liability of the

railway, furnishes another example, and one, moreover, of agreements which must not only be in writing, but must also be in a particular form.

Clause (2).—On the subject of the registration of documents, the law is set out in Chapter IV, dealing with Act III of 1877. Point (*d*), clause (2).

Clause (3).—No special form of execution or authentication of contracts is necessary as regards a private person; but public bodies, companies, and partners must execute conformably to law. The case of partners has already been dealt with under the Contract Act and it is only necessary to add that partners often trade under the name of a company though no such incorporated company exists. In such cases each partner should ordinarily be a party to the contract and should execute it. The other cases need not be discussed in this Manual for the reason just given as to public bodies under point (*d*), clause (1) Point (*d*), clause (3).

Clause (4).—This depends on the provisions of the Stamp Act quoted in Chapter VI of this Manual,—on the general and special exemptions in force under it,—and on the agreement (if any) of the parties as to incidence of the duty. It may be as well to remind officers, since several have asked for further information on this subject, that all agreements entered into with the Public Works Department by contractors for the execution of work or for securing the due performance of contracts are exempt from stamp-duty. (Public Works Department Code, Volume I, Chapter VIII, paragraph 921.) On the other hand, instruments between Point (*d*), clause (4).

contractors and local bodies, such as Municipal Committees, are not exempt and must be stamped according to law. It has been suggested that the Manual should furnish instructions as to the particular stamps which agreements, powers-of-attorney, etc., should bear. The stamp on any agreement (where one is required) is eight annas. That on powers-of-attorney varies with the nature of the instrument. Full details will be found in Article 48, Schedule I, of the Stamp Act (II of 1899), in Part II of the Manual. The most useful clause in that article is clause (*c*), which shows that the proper stamp on a power-of-attorney authorizing one or more persons to act *in a single transaction* (one contract, however large, would be such) is one rupee. " General " powers-of-attorney are dealt with in clauses (*d*), (*e*) and (*g*) of the same article. The rule may be briefly stated as prescribing on such instruments, *i.e.*, general powers-of-attorney, a stamp of one rupee for each person authorized to act, with a minimum stamp of five rupees. The explanation to Article 48 provides that for the purposes of that article more persons than one when belonging to the same firm shall be deemed to be one person.

(6) ARE THE PROVISIONS OF THE PROPOSED AGREEMENT WISE AND APPROPRIATE?

HEAD I, SUB-HEAD (6). 56. It is not proposed to discuss in this Manual the suitableness of the various forms provided by Government for contracts generally. These forms leave untouched many particulars which help to make up the sum of an agreement. Nor do they apply to contracts of every sort. There is ample room, therefore, for the exercise of discretion, and a few words in this connection may be useful.

57. The following words of one critic are eminently sound:—"Nothing should be allowed to appear in any part of any contract merely for form's sake or which certainly would not be enforced if occasion arose." It may be well to here draw attention to the fact that in the absence of agreement, or usage, or local law, to the contrary, the law itself imports a large number of conditions into certain contracts, without any mention being made of them in the instruments of contract: see for instance sections 55 and 108 of the Transfer of Property Act. As to the latter Act see the remarks at pages 163 and 168.

Sound general advice.

The law itself sometimes imports conditions unless negatived.

58. No agreement can be expected to work satisfactorily unless it is *reasonable*, not only in money rates, but also in other respects. An undertaking to perform a work at hopelessly low rates or in an impossible time is bound to end in failure. A case could be cited in which, after a total break-down, the contractor plainly admitted that in taking the contract he had relied on securing a considerable enhancement of rates in the course of it, because the Government had given him such an enhancement on a previous occasion. A tender at very low rates is rarely worth accepting; for either the contractor will endeavour to sublet the contract at a profit at the outset and himself clear out, or he will pray for and obtain some concession later on, or he will pick a quarrel on some pretext and throw up the work after having executed and received payment for the easy part of it, so that it would have been better in the end to have given the work in the first instance at a higher rate to a more reliable man. The remark appears just that in a schedule contract care should be taken that every single one of the rates for the different sub-heads is admittedly fair and reasonable, and that one is not high, a second one reasonable, a third one low, and only the *average* rates for the whole of the sub-heads reasonable: each sub-head of every work should in itself be complete and independent of the other. The same remarks apply to an offer to execute work in an unreasonably short period of time. The contractor must live. In order to secure a fair profit, he must have moderately remunerative

Agreements should invariably be *reasonable*.

Warning against absurd offers.

the law and lawyers when this can possibly be prevented. The instances where proper utilization of a sound arbitration clause cannot keep the dispute out of Court are few indeed.

Tendency of summary power of ending contract to raise rates discussed.

67. Another and weightier objection to the summary power under discussion is that contractors will either decline to agree to it or else raise their rates in view of it. The compiler ventures to doubt the likelihood of the former alternative, but cannot help thinking that there is truth in the latter one. The risk of summary termination of a work without any cause stated is a risk which no prudent contractor ought to entirely ignore in fixing his rates. Assuredly, some small percentage ought to be added by way of insurance against this contingency: and the Government ought not to grumble at paying it. Where, on the other hand, the right is expressly limited to the occasion of *bad work or progress, or other practical breach of the* agreement, no such percentage is reasonable or should be agreed to. It may be here mentioned that it is by no means necessary that the power to summarily terminate a contract shall be mutually enjoyed by both parties.

Arbitration clause.

68. The usual arbitration clause is also a most desirable one, much too rarely enforced when occasions for its use occur. When properly drawn and limited in scope, it is quite legal under the provisions of section 28 of the Contract Act, *in noting on which the point* has already been discussed at considerable length (*a*).

As to direct payment of contractor's labourers.

Nor does there appear to be anything illegal in a condition that the Government shall be entitled to make specified payments for work done or materials supplied under the contract direct to labourers or others in the contractor's service. The opinion of officers consulted is, however, opposed on grounds of expediency to such a condition, and it is therefore not recommended save, perhaps, in very exceptional circumstances.

Immense

69. It is very desirable to expressly provide in

(*a*) See page 77.

contracts of any importance that any complaints, notices, etc., made or given by or to the contractor shall be *in writing*. This course has obvious advantages. It places not only the terms, but also the date of the communication beyond dispute, and both terms and date may be important. It is probable too that the necessity of reducing such matters to a written form tends to prevent frivolous complaints which the maker would be ashamed to see, and be afterwards confronted with, on paper. The compiler of this Manual remembers a case in which the officers concerned complained bitterly that the contractor's agent never ceased to make petty and causeless oral objections whenever he had an opportunity. Another very considerable advantage of requiring that representations shall be written is this: *these would completely bar a change of front*. A case could be cited in which one of the grievances most emphatically alleged in a suit by the contractor was that the officers of Government had throughout obstructed his progress by not supplying plans and materials punctually and thus keeping his enormous staff of workmen idle. When the truth was at length—largely by aid of the invaluable notebooks of the Executive Engineer—revealed, it turned out that so far from this being the case, the fact was that the contractor never paid his workmen, and never was able to keep up anything like an adequate staff of men to carry on the work with reasonable speed. Had the contract required that complaints should be written, this dishonest allegation would never have been made, or, if made, could have been at once refuted. If officers gain nothing by a perusal of this Manual beyond a clear appreciation of the value of 'black on white,' (*a*) they will repay the expense of preparing it. The principle above insisted on is of universal application. A particular instance of it will be found in clause 12 of Public Works Department Form K-1. Nor is it only in the actual instrument of agreement that this practice should be observed. All preliminary negotiations and all subsequent communications should also, to the utmost extent possible in practice,

Value of having all material communications on paper explained.

Not only the agreement, but also prior and subsequent communications should be

(*a*) Commonly, but incorrectly, expressed as "black and white"

reduced to writing.

be reduced to writing. It is not, of course, contended that matters should never be talked over with an intending contractor. This would be absurd. But it can safely be asserted that nine-tenths of the disputes with contractors arise out of oral communications. Jones based his claim for higher rates mainly, if not entirely, on alleged speeches by the officers with whom he had discussed the work. His counsel denounced the evidence of these officers, who flatly contradicted Jones on the point, as unreliable. How was the Court to decide? Very remote considerations indeed had to be utilized in order to demonstrate the falsity of the plaintiff's assertions. The same man played exactly the same game in another case, which affords an excellent instance of an oral agreement which ought never to have been so made. He met the Executive Engineer as he rode along, and stopped him. He stated that he had a larger supply of white lead in stock than he required, which he was willing to sell to Government at Rs. 20 *per cwt.*, and begged the Executive Engineer to "relieve him" of his surplus stock. The Executive Engineer requested him to send a sample, and one was sent, on the strength of which the offer was accepted, and a quantity of white lead was delivered. On examination it proved in part to be rubbish, and the seller was quite properly requested to remove the whole of it. He refused, and sued for the price of it. It turned out that his statement as to having had this white lead in stock was false, it having simply been lying elsewhere on commission sale at Rs. 9 *per cwt.* at the time of the conversation, and not his own property at all. *He absolutely denied the conversation as above described, and gave the Executive Engineer the lie direct.* Fortunately, the Court decided the question of fact correctly; but if only the Executive Engineer had declined to listen to an important proposal of the kind in a casual way, and had requested the proposer to say what he wished to say *in writing*, all controversy over the facts of the proposal would have been prevented. Countless other illustrations could be given. Officers cannot too emphatically realize the truth and value of the maxim *vox emissa volat, litera scripta manet.**

A good example of neglect of this rule

Valuable maxim to remember.

* "The uttered word flies away, the written letter remains"

They will protect not only their employer, the Government, but also themselves, from most serious risks if they will only insist habitually, to the utmost extent possible in practice, on some record or other being made of their communications with contractors before, during, and even after completion of, their contracts. The Courts are fallible after all, and where an officer swears to one thing, and a contractor swears to the exact contrary, the Court *may* believe the latter and not the former. It needs no argument to show that the position of an officer in those circumstances would be an extremely unpleasant one. The true preventive is plain and simple: *let communications of any appreciable consequence with contractors be invariably written, and let correct copies, mechanical if possible, be invariably kept and be carefully safeguarded to the utmost extent possible in practice: and where the stress of practical business prevents this, at least let a note of the substance be made at or near the time.* This matter will be again briefly touched upon under Head II, Sub-head (1), of this chapter.* True preventive to use.

70. It has been remarked that "the less one puts on paper, the less chance has a dishonest contractor of resorting to a 'hungry lawyer,'" and that "written contracts can almost always be interpreted so as to be more favourable to the contractor than to Government." These views can only rest on a misconception. How is any communication rendered less simple in its terms by being written down, or more simple by being delivered by word of mouth? Is it not quite evident that the method of information used in no way affects the clearness or obscurity of the language actually employed, and that an oral communication is subject to a special danger of its own, *viz*, honest misapprehension or wilful misrepresentation of what was said? How can a dishonest contractor pervert written words? True, he can twist them into unfair meanings. But why can he not do the same with spoken ones? Of course he can, and moreover he can alter them, substituting 'more favourable' expressions which never The delusion of a few, in favour of 'keeping off paper,' exposed.

* See pages 243—246

were uttered at all. Apart, again, from the incomparable superiority of written communications as regards substantiation of their terms, they have the great extra advantage of constituting a plain unchanging record for purposes of reference, which to be rightly grasped needs only to be read. To dispel the delusion of preferring oral agreements, orders, complaints, or other representations to written ones, it would be worth while to print in full the record of Jones' or Mulchand's case; but space forbids. It is satisfactory to state that, with two exceptions only, the advice printed above in italics, and reiterated elsewhere in the Manual, in favour of *writing* all communications of importance, has commanded the universal acceptance of those consulted.

(7) ARE THE PROVISIONS OF THE PROPOSED AGREEMENT EXPRESSED IN SUITABLE WORDS?

HEAD I, SUB-HEAD (7).

71. The importance of excluding all room for doubt as to the conditions agreed upon needs no demonstration; but the rigour of the Law of Evidence, the provision of which on this subject have already been quoted and commented on in Chapter II, emphasizes it. The parties must stand or fall by the language used. No evidence to fill up patent ambiguities (that is to say, ambiguities evident on the face of the language used), or to explain that by "two" was meant "four," will be allowed. The agreement must speak for itself.

The two grand objects, in framing an agreement.

72. The two grand objects to achieve are these: (*a*) nothing material must be omitted, and (*b*) all that is expressed must be unequivocally worded beyond the reach of perversion. For it is not merely honest mistake that has to be shut out; all opportunities for cunning and ingenious distortion by professors in the art of making black appear white must also be foreseen and overcome. As regards the inclusion of all expedient conditions, the Forms of the Public Works Department Code are very comprehensive. A good many officers have urged that these Forms are seriously in need of revision, and that a few less elaborate,

Proposed revision of P. W. D. forms.

really simple, forms of "work-order" are required. The compiler is of the same opinion. It is, however, no part of the scheme of this Manual that it shall include such a revision. This must be undertaken, if at all, in conjunction with executive officers of great experience. Again, it has been suggested that the Manual should furnish practical hints as to the best Forms to use for various classes of works, with a commentary and warnings against pitfalls. While fully concurring in the view that much useful help could be given in this way, the compiler regrets that there is no space for such a disquisition in the Manual. He hopes that the whole subject may be comprehensively handled ere long by a much better qualified agency than himself. The same remarks dispose of the suggestion that the Manual should explain those modifications of the Forms which are required in order to adapt them for use on behalf of municipal and other corporate bodies. The whole subject should be dealt with together. It is worthy of consideration however, whether, instead of having very lengthy and elaborate forms for execution by individual contractors, it would not be possible to stereotype by far the larger number of the conditions contained in them, and to announce once for all that save as may be expressly provided to the contrary in particular cases, every single contract entered into with Government is made subject to the standard conditions. These conditions could be printed in all necessary languages and kept at the office of every Executive Engineer for supply *gratis* to applicants. They would thus become universally known and understood: no person could ever reasonably plead ignorance of them; and much time would be saved which is, or ought to be, at present devoted to explanation of the prescribed Forms to individuals. Every negotiation could then rest on a solid foundation. "Do you know the standard conditions?" "No." "Then get a copy from the office, and come back when you know and accept them, and not before." This suggestion has been almost unanimously approved of, and it is hoped that Government will see its way to giving effect to it ere long. It has been proposed that similar standard schedules of rates should be prepared for each division. Such

Standard condition suggested.

Standard *rate* schedules proposed but impracticable

should be required. under sub-head (7) as 'standard conditions for contracts in emergent cases.'

The law as to oral and written agreements explained. 81. It may be here explained that, excepting where the law requires a writing, oral agreements are just as valid and binding as written ones. The subject has already been touched upon in Chapter VII of this Manual, and in Head I, Sub-head (5) (*c*), of this chapter.* There is (such special cases apart) no distinction whatever, except that oral agreements rest on mere memory and are fertile in disputes, while written ones prove beyond controversy the terms agreed on. It is noteworthy that *signature* by both parties is not (except where specially required by law: *e.g.*, by section 72 of the Railway Act) essential to the validity of a written contract, but leaves the door open later on to deny the final conclusion of the contract. (It is not absolutely indispensable that every separate sheet of an agreement extending over more than one sheet shall be signed; but, in cases where the agreement is not registered, it is unquestionably right that not only every separate sheet be signed by both parties, but also every interpolation and other correction. A registering officer may refuse to accept for registration any document containing an interlineation, blank, erasure, or alteration, unless the same be at least initialled by the parties: *vide* section 20 of the Registration Act. As already explained at page 135, nothing should ever be erased: alterations of every sort should invariably be made in red ink, *leaving the original words legible.* Proof of what was first written may be of the greatest importance.) "If the terms of an agreement be put into writing and the writing be accepted by the parties as their agreement, though their assent be not evidenced by signature, nevertheless the agreement is a written agreement." This is of great importance. Even in the greatest emergency, the officer engaging a contractor can at least himself write a memorandum or even telegraph one. Mere acceptance of the terms embodied in such communication would bind the contractor quite independently of his signing it. A simple form of *ad interim* communication for use in

* See pages 220—222.

emergent cases is appended,* which might suffice to shut out extravagant claims later on.

82. The question has been asked whether, after a contractor has signed an agreement which can only be accepted for Government by—say—the Chief Engineer, the contractor, although he may have begun his preliminary operations, remains free to throw up the contract so long as the agreement proposed by him has not been signed on behalf of Government. The reply is that undoubtedly he remains free to do so as long as Government's "acceptance" (see Contract Act, section 5) has not been communicated to him. The essence of contract is *reciprocity*. There is no contract, where one party is bound and the other is free, save in the wholly exceptional cases enumerated in section 25 of the Contract Act (see page 74 of the Manual). So long, therefore, as it remains open to the Chief Engineer to accept or reject the proposed agreement, the contractor also remains free to revoke the offer by him evidenced by his signing the document, although he may voluntarily have begun his preparations or performance, in reliance on Government's also signing the agreement. It must, however, be again pointed out that the mere act of signing is *not* indispensable to a valid agreement. As soon as the Chief Engineer has communicated to the contractor his unqualified acceptance of the proposed agreement, both parties are bound thereby, and it is immaterial if the Chief Engineer does not sign it at all, so far as the binding force of the agreement is concerned. The written document, and the signatures of the parties on it, are merely convenient *evidence* of a fact which exists independently thereof and which could be proved by other evidence, even if the written document were never executed, or ceased to exist (see section 65 of the Evidence Act, at page 25 of the Manual).

Up to what moment a party to a contract can draw back explained.

83. The opinion has been expressed that as a great many contracts must of necessity be entered into verbally, the few remarks on this method of contracting contained in the Manual should be amplified. This

Precautions recommended in cases where a verbal agreement is entered into.

* In Chapter IX, No 6 See also No 14

seems sound. Assuming that the officer concerned has satisfied himself that a verbal contract is legal (see page 220), it is obvious that as there will be no *written* proof of the terms to produce, these ought invariably to be settled in the presence of a third person of intelligence and respectability, whose evidence is sure to be available and will carry weight. The officer ought assuredly to make *at the time* a clear memorandum of the terms and of the name and address of the witnesses present. Again, he should take every possible precaution to ensure that the contractor is at one with him, by making him recite with his own lips the whole of the terms, not in a parrot-like way, but in the contractor's own phraseology. All the remarks in sub-head (7) *supra* should be borne in mind. Under no circumstances whatever should an officer contract orally in the absence of witnesses on his side, so as to expose himself to flat contradiction by the contractor and to the danger of the great disgrace of being disbelieved by a Civil Court. Corroborative evidence of *some* sort should be a *sine quâ non*.

Reminder of special provisions of law.

84. Attention has already been drawn to special provisions of law regarding stamping, registration, and the like, all of which must, of course, be attended to.

(9) IS SAFE CUSTODY OF THE INSTRUMENT OR INSTRUMENTS OF AGREEMENT AND OF ALL DOCUMENTS AND OTHER THINGS MATERIAL TO IT OR THEM CLEARLY ASSURED?

Head I, Sub-head (9).

85. The *importance of preliminary correspondence*, etc., has already been illustrated—for example, the certificates and visiting-cards tendered by Mulchand and the goods-forwarding-note in the case of grain misconsigned to Burdwan. Negligent loss and criminal abstraction are equally injurious to the party who needs the evidence, and both should be guarded against with the utmost care. Where the agreement is registered, all risk as regards future proof of its terms is at an end, and it is submitted that every really important document, at any rate such as are not executed in duplicate, ought to be registered. It has

Registration strongly recommended.

already been explained that any document whatever may be optionally registered under Act III of 1877. The cost and trouble are nominal: the advantage may be enormous. The same remarks apply equally to other objects material to the agreement.

86. It would appear sheer waste of words to impress on officers the importance of preserving samples agreed on by both sides as the standard of quality which the articles or materials supplied are to reach, were it not the fact that time after time, even within the personal experience of the writer, officers of long standing have been found to have neglected this obvious precaution. The samples of kunkur on which Mulchand got his contract have already been quoted. Exactly in the same way, the sample of white lead sent for approval by Jones, and on the strength of which he got his order to supply a large amount, was actually returned to him without the officer's even waiting to see if the bulk corresponded with it. Action of this kind literally invites dishonesty, and complicates the defence of Government suits in a most unnecessary manner. Of course, such samples ought to have been preserved with jealous care, as affording in themselves a complete reply to any attempt to extort damages for Government's refusal to take delivery of inferior qualities.

Importance of safeguarding samples.

Instances of neglect of this precaution cited.

87. Both the *custody* and the *identity* of samples demand careful attention. The writer remembers that the excuse offered for the non-retention of Mulchand's kunkur sample was that the officer in question gave so many contracts that he had no room to preserve the samples. The reply is obvious: in such case he ought to have taken care to describe the standard of quality in the agreement itself in terms sufficiently explicit to render appeal to a sample needless; and this, as a rule, is probably the wiser course to follow. Several officers have dwelt strongly on the expediency of contracting by specification, where possible, and not by sample, in contracts for the supply of *materials*. Where this is not possible or practicable the greatest care should be taken of the sample. First to enter into an agreement unintelligible save by reference to a produced sample,

Both custody and identity of samples equally important.

Always contract for materials by specification not by sample, where practicable.

and then to throw the sample away, is inexcusable rashness, and it naturally led in the case in point to a law-suit.

Invitation to officers to send up their own comments on what is stated in this Chapter.

88. The above remarks conclude such suggestions as the compiler is able to offer, as regards the questions chiefly to be considered in entering into a contract. Beyond doubt, there is much more to be said on this most important subject, and it is hoped that a perusal of what has been written in this Manual may induce officers of experience to come forward from time to time with their own comments on all the heads of this chapter. Their remarks cannot enter too minutely into detail, whether for or against the suggestions offered. In this way alone can a really complete and reliable guide on the subject be eventually compiled. There are few combinations of circumstances possible which have not arisen in the experience of some officer or other. If all would put their experience together, and do their best to leave no useful point untouched, the aggregate result could not possibly fail to be of practical utility. Answers to such comments could be periodically embodied in revised editions of the Manual

HEAD II.—MATTERS OF IMPORTANCE DURING THE PERFORMANCE OF A CONTRACT.

89. When the subjects discussed in the preceding part of this chapter have received due attention, the chief difficulties of a contract have been overcome. A well-drawn agreement will provide for all ordinary contingencies, and an honest and well-meaning contractor will be prepared to meet his employer half-way as regards unforeseen complications. Even in such a case, however, and much more so where the contract has not been advisedly entered into and framed with care, there are some questions which require attention in the course of performance—points none the less material for the fact that they can be briefly disposed of in this Manual. Careful attention to the matters touched on under Head I will have overcome the chief difficulties.

90. The following sub-heads will be touched upon:— SUB-HEADS OF HEAD II.

(1) The value of contemporary record.
(2) Accessibility and supervision.
(3) Modification of contracts.
(4) The dangers of real or apparent acquiescence.
(5) Procedure on abandonment or other breach of contract.
(6) Squatters.
(7) General principles.

(1) THE VALUE OF CONTEMPORARY RECORD.

91. Throughout the course of a contract, it must never for one moment be lost sight of that, however smooth its current seems at first, there may be rocks ahead. No one can predict beforehand upon what point or points differences of opinion and disputes may arise, or how far back into the past sequence of events he may be compelled to search in order to marshall the evidence necessary to rebut unjust allegations. In a recent suit, already described as 'the collision case,' suggestions of conspiracy and fabrication of evidence were freely made against the railway, and, in order HEAD II, SUB-HEAD (1). In every contract there may be hidden rocks ahead. A concrete example.

to rebut these, it became necesary to trace back the history of a particular carriage for years, as well as to produce a great amount of collateral evidence fortunately procurable from old registers. Had there not been a fixed official system in force under which, as events occurred, they were placed on record *at the time,* the desired proofs could not have been obtained, and the plaintiff's wholly unwarrantable aspersions, as a fact devoid of a shred of foundation, might have produced a noxious effect in the mind of the Judge. Now, the antidote to poison of this kind is *contemporary record.* It is quite impossible to overstate the importance of written memoranda made at or about the time to which they refer, noting every incident and fact of the slightest perceptible relevancy in connection with the contract. The practice of keeping note-books has already been discussed, and examples of its great utility have been given.* As already said, there is no intention of suggesting that every commonplace remark to every contractor should be noted down. Such a procedure, besides being impossible in practice, would defeat its own object by overwhelming useful entries in a shapeless mass of ephemeral ones. But it is strongly pressed on the consideration of officers that a brief note should be made *at the time* of every fact which materially bears on the contractor's present and future legal position. Hence the stringent rules of the Public Works Department regarding periodical measurements. If the progress of a work is seen to be defective, and the contractor is orally warned at the time, the date of this warning may afterwards turn out to be most material, as the exact purport of what was said to him may also prove to be. Unless at least a note was made at the time, these particulars perish. It is submitted that there is no sufficient reason why officers when inspecting works should not all carry note-books capable of producing every entry in duplicate, one copy to be retained, and the other to be handed to the contractor. This course would deprive him of all opportunity of pleading ignorance, while at the same time enabling an officer to maintain an exact

True antidote to unjust aspersions is *contemporary record in writing.*

Note-books producing entries in duplicate recommended.

* See pages 42 and 228—232 of this Manual

record of every material step taken by him since performance began.

92. There seems to be some misapprehension on this subject on the part of a few of those consulted. One officer contends that such orders would be liable to be hasty, and if numerous would probably be contradictory of each other. He recommends formal written orders from office as preferable. Another officer deprecates the proposal on the score of the labour involved. A third doubts the efficiency of the plan, since the contractor can deny ever having received the copy. A fourth would prefer a formal 'order-book,' on half-margin, to be kept on the work. As regards these objections, it may be observed that the mere trouble of writing down an order tends to *prevent* hastiness, and that written orders are not more but less likely to be self-contradictory than oral ones, since previously-given written ones can always be referred to before fresh ones are issued. The labour involved is the very best investment of his time that any officer can make. Undoubtedly it is preferable to issue considered orders in carefully chosen language from office, whenever this may be practicable. All that the compiler urges is that no orders whatsoever of consequence should be delivered *orally*, and whenever it is unavoidable to give such orders at the work, they should be noted down at the time; and it is not a whit more laborious to write over a black sheet producing a duplicate than in an ordinary note book. Whether this plan, or a formal 'order book,' be chosen is immaterial. Both have their advantages, and officers should judge for themselves which to adopt. As to the possibility of the contractor's denying receipt of a copy, the ordinary course of business would cogently support the officer's assertion to the contrary, and at any rate it is better to be able to prove conclusively what order was written than to depend entirely on oath against oath. In short, the case in favour of using note-books is conclusive, and the compiler earnestly recommends such as reproduce entries in duplicate. In submitting this advice he is supported by officers of great experience. Messrs. Newman and Company's "Field Memo. and Note-book" is stated to be suitable. The use of official note-books

Objections to the writing down of material orders stated and answered.

on certain subjects of importance is, of course, already compulsory under the Public Works Department Code.

Great value of such memoranda in case of transfer, etc., of officer.

93. The immense advantages of such memoranda, not only in the event of the same officer's having to prove and vindicate his action in Court, but also in case of his transfer, absence on leave, retirement, or death, have already been touched upon. The convenience of being able to thus hand over to one's successor, on a sudden transfer for instance, a complete record of the state of every pending contract in the division need not be pointed out.

Similar value of material objects as proof pointed out.

94. Perhaps, however, the great utility of a similar practice as to material objects may not have occurred to some. If, for instance, a *kunkur* contractor is persistently tendering dirty nodules unfit for acceptance, the simple precaution of selecting, labelling, and carefully *storing a small sample of the rejected material may* save an infinite conflict of evidence afterwards. This fact and the size of certain stones—also provable with ease by simply keeping a specimen—constituted two of the many hotly-contested questions of fact in the much-quoted case of Mulchand, in which it is regrettable to state that samples of these had not been preserved.

Photography is now-a-days a useful method of proof.

95. It is a question whether photography, now so cheap and easy, would not usefully be employed to record unanswerable proof of the state of important works on a given date, where the officers concerned contend that the time clause of the contract is being seriously violated.

Moral of the above remarks.

96. The moral of these remarks is this: that in some form or another, visible, tangible, unambiguous proof of every fact material to the course of a contract should be *secured as it occurs*, and after being secured should be *carefully kept*. In the case already mentioned, where a contractor liable for damage to certain roof-trusses was improperly relieved by the Court, some most important letters received in the course of the contract from the contractor, and in which he admitted his liability, vanished from the office of the Executive Engineer, to the grievous injury of the defence. Officers should clearly realize that *every*

Fundamental principle

contract has within it a potential law-suit and illimit-

able potentiality of double-dealing. The only safe course is to look on every contractor as a possible future antagonist, and act accordingly from the outset. never to be forgotten.

(2) ACCESSIBILITY AND SUPERVISION.

97. It is desirable that officers should at all times make themselves accessible to their contractors, or, what is probably still better, make their sub-divisional officers observe this practice. (There is some danger of weakening the sub-divisional officer's authority and raising a crop of complaints if the Executive Engineer grants frequent interviews himself.) Such interviews should under no circumstances be permitted to take place at any officer's private residence. Officers should always be ready to assist their contractors with advice when they want it, and should show an interest in their work, in its fair remunerativeness and satisfactory character, and in their welfare generally. It is decidedly important to make it worth a good contractor's while to contract again. If in his first job he has been well treated, this fact will encourage him to tender at moderately profitable rates, and to do his best to maintain the good opinion indicated by the fact of his re-employment. The friendly help and the personal supervision of officers will go a long way towards creating a good spirit in their contractors, and towards making it worth the while of both sides to establish permanent business relations with each other. A close watch should be kept on sub-divisional officers in this connection to ensure their acting on the principles expressed above. It is important too that contractors should in their turn pay their labourers honestly and punctually, or the work is sure to suffer. Neglect of this duty was one source of the troubles which gave rise to Jones' case. There is nothing illegal in an express condition of a contract that the contractor shall pay all his labourers at specified times and in the presence of a named official, and failure without reasonable excuse to comply with this condition if made an essential one by agreement would constitute a breach of the contract entitling the Government to put an end to it, and to claim compensation for any loss directly resulting from the contractor's misconduct. There is,

HEAD II, SUB-HEAD (2). Importance of treating contractors with consideration.

Question of controlling payment of contractor's labourers discussed.

on certain subjects of importance is, of course, already compulsory under the Public Works Department Code.

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Fundamental principle

contract has within it a potential law-suit and illimit-

able potentiality of double-dealing. The only safe course is to look on every contractor as a possible future antagonist, and act accordingly from the outset.

never to be forgotten.

(2) ACCESSIBILITY AND SUPERVISION.

HEAD II, SUB-HEAD (2). Importance of treating contractors with consideration.

97. It is desirable that officers should at all times make themselves accessible to their contractors, or, what is probably still better, make their sub-divisional officers observe this practice. (There is some danger of weakening the sub-divisional officer's authority and raising a crop of complaints if the Executive Engineer grants frequent interviews himself.) Such interviews should under no circumstances be permitted to take place at any officer's private residence. Officers should always be ready to assist their contractors with advice when they want it, and should show an interest in their work, in its fair remunerativeness and satisfactory character, and in their welfare generally. It is decidedly important to make it worth a good contractor's while to contract again. If in his first job he has been well treated, this fact will encourage him to tender at moderately profitable rates, and to do his best to maintain the good opinion indicated by the fact of his re-employment. The friendly help and the personal supervision of officers will go a long way towards creating a good spirit in their contractors, and towards making it worth the while of both sides to establish permanent business relations with each other. A close watch should be kept on sub-divisional officers in this connection to ensure their acting on the principles expressed above. It is important too that contractors should in their turn pay their labourers honestly and punctually, or the work is sure to suffer. Neglect of this duty was one source of the troubles which gave rise to Jones' case. There is nothing illegal in an express condition of [illegible] pay all his labourers [illegible] sence of a named official, and failure without reasonable excuse to comply with this condition if made an essential one by agreement would constitute a breach of the contract entitling the Government to put an end to it, and to claim compensation for any loss directly resulting from the contractor's misconduct. There is,

Question of [illegible] cussed.

however, a conflict of opinion as to the practical expediency of such a condition. It is feared that many contractors would resist it: that it savours of undue interference and might lead young officers into difficulties: and that it would heavily increase work and drag officers into Court. On the whole the opinion is probably correct that such a stipulation ought only to be necessary in very special cases.

The question of Government's paying the labourers o an absconding contractor.

98. It has been asked what is the proper course to adopt in order to secure Government's legal position where, a contractor having absconded without paying his labourers,—for example, ignorant frontier men incapable of understanding the niceties of law, and who simply look to Government for their money—these people are paid by the Executive Engineer, under orders of the Executive Government issued for good political reasons. The answer to this question will be found in sections 69 and 70 of the Contract Act (not quoted in Part I of the Manual). (Of course the Government has no right to make such payments where it is neither "interested" in the matter nor morally bound—see section 70—to look after the labourers' welfare.) The former section enacts that "a person *who is interested* in the payment of money which another is bound by law to pay, and who therefore pays it, "is entitled to be reimbursed by the other." The words in italics are in the compiler's opinion wide enough to include a political interest, but what view the Courts would take on the subject he cannot venture to predict. (*a*) Surely the prevention of frontier ill-feeling (which might excite tribal hostility) is as real an interest as the direct saving of a few rupees? Assuming, however, that the Courts were narrow-minded enough to think that the word "interested" must be restricted to a pecuniary interest, then the Government could fall back on section 70, which enacts that a person is bound to make compensation to another who lawfully does anything for him, not intending to do so gratuitously. Mr. Justice Cunningham rightly points out that this section adopts a broad principle, and the cases cited by him go to show that where (as in the instance under con-

(*a*) This appears to be very doubtful.—C. B. P.

sideration) there is a *moral* obligation, although no legal one, to pay money, he who pays it can recover it under this section. The *method* of recovering it, if the amount is still due by Government to the contractor, is simply to cut it from his bills and leave him to sue for it, when it can be pleaded as a "set off": if the man's bills have been paid, the only resource is to sue him, as provided by sections 69 and 70. The best plan of all, however, is to provide for the point in the agreement itself. As to a 'set off' see the remarks at page 96.

(3) MODIFICATION OF CONTRACTS.

99. The question of modifications of contracts in the course of performance is one of great importance. So long as the original terms remain in force, the contract is clear and plain, and complications can with difficulty arise if the agreement is well expressed and exhaustive. But the moment that those terms are modified, there is serious danger of future trouble, unless the alterations are *clearly understood and expressed*. It is always necessary, too, that *the indirect results* which the proposed modification may have on the other terms of the contract should be carefully realized before the change is agreed to. Finally, when the terms of the modification have been settled, it must be *effected in a legal manner*. First, as to precision respecting the *meaning* of what it is proposed to introduce. Nothing can be more fatal than ambiguity, leaving it open to one side to understand one thing and to the other side to understand another thing. Trouble is then certain to ensue. The best illustration within the recollection of the compiler of this Manual is derived from the case about re-roofing a building already mentioned. At an early stage of the work a duststorm blew down and smashed the trusses, which had not been properly braced together by temporary battens. The contractor, fully conscious of his liability to replace these trusses under the terms of the agreement, wrote to the Executive Engineer and prayed him to promise that Government would bear this loss by paying for new trusses. (This was one of the

HEAD II, SUB-HEAD (3)

Points which must be attended to.

(1) The exact meaning intended.

An example of injudicious action.

letters subsequently stolen from the Executive Engineer's office as above described.) Now, it may be remarked in passing that it was not in the competence of the Executive Engineer to modify the contract as proposed, its amount exceeding his powers of contracting. This point will, however, be again adverted to below, in paragraph 103. But in any event it was clearly necessary that so serious a modification, if made at all, should be made in explicit terms. Instead of answering plainly yes or no, the Executive Engineer merely wrote back to the effect that, *unless the work progressed at a satisfactory rate, this proposal could not be listened to.* It is needless to add that the contractor took this reply as a grumbling consent, and strongly relied on it afterwards in Court. A more injudicious answer could not have been devised. The first thing to do, therefore, is to form a clear conception in one's own mind whether one intends to consent to any modification or not, and, if any, then precisely what modification.

(2) Clear *expression* of that meaning

100. The next thing is to *express* the meaning intended in plain and unmistakable language This needs no comment.

(3) Consider *indirect* consequences before making any change.

101. Next, no modification should be introduced until its *indirect results* on the other terms of the contract have been fully considered. Suppose that, according to the original contract, *time is of the* essence, *i.e.*, the whole work has to be completed by a specified date under heavy penalties. Now, if any modification whatever, by way of enhancement, of the work to be done by the contractor be introduced, *without doubt the serious question will subsequently arise* whether such modification did not tacitly amount to a waiver (or abandonment) of the time-condition. Accordingly, this point should be fully weighed before the modification is agreed upon, and a further modification should also be agreed on, namely, by what period, if any, the time-clause is to be extended. If it is not to be extended, this should be carefully stated in explicit terms. . Unless the complete concurrence of both parties can be reached as to *all* points affected by the proposed change of the original agreement, the change should be abandoned.

102. Lastly, it is essential that the alteration of the original contract be *legally effected*. In this connection, the parties must be duly acquainted with sections 62 and 63 of the Contract Act, with section 92 of the Evidence Act, with section 49 of the Registration Act, with section 72 of the Railway Act if the agreement be a special one to which that section applies, and with sections 54, 107, 131, and 132 of the Transfer of Property Act if the matter falls under any of these provisions. A better instance of the practical necessity for some knowledge of these laws on the part of officers who can bind the Government by contracts, if they are to work their contracts safely could not be found. Those who have studied the earlier chapters of this Manual will be able to appreciate the formalities which may be essential to a valid modification of an agreement. Take a single case as an illustration. A house is hired for two years by the Government under a written lease, registered as required by the Transfer of Property Act and by the Registration Act. The Government subsequently wishes to alter one of the covenants of the lease. The lessor has no objection, and writes and says so Now, it is clearly competent to both parties to alter the original contract (section 62 of the Contract Act). But inasmuch as the contract is one which the law (Transfer of Property Act) "requires to be in writing," and has, moreover, been registered as is also doubly required by law (Transfer of Property Act and Registration Act), a mere oral or written agreement to modify it cannot be proved in Court: nothing but a written *and registered* instrument will be admissible in evidence for this purpose. (*a*)

(4) Effect modification in a *legal manner*. Practical illustration of need for some knowledge of the Acts quoted in Chapters II—VII of the Manual.

An illustration

103. It should also be distinctly understood that only an officer competent to contract in the first instance is empowered to agree to modifications of the contract, since that is in itself contracting afresh. It is only "the parties to a contract" who can modify it under section 62 of the Contract Act. (Of course, as already stated elsewhere, the contracting officer can employ a subordinate to *communicate* his consent, who

Only an officer competent to make the contract can modify it.

(*a*) See the remarks at pages 163 and 168 regarding the applicability of the Transfer of Property Act to the Punjab

would address the contractor " by order.") If, therefore, in any instance it seems urgently necessary for a subordinate officer to permit a contractor to deviate *from the written agreement*, the clearest understanding should be both reached and recorded that the modification is subject to ratification by the contracting authority.

Sample form in Chapter IX.

104. It has been suggested that the Manual should furnish a sample form for the safe modification of an agreement, with general instructions for dealing with such cases. A brief form of the sort has been added to Chapter IX, as No. 15, with a few notes attached.

(4) THE DANGERS OF REAL OR APPARENT ACQUIESCENCE.

HEAD II, SUB-HEAD (4).

105. It is expedient to point out the great importance of not losing a moment in calling a contractor to account who is seen to be deviating from his undertaking. Acquiescence in any violation of the agreement is absolutely fatal. "*Qui tacet consentire videtur.*"* This maxim is sound sense, and its scope is fully realized by contractors. In Jones' case great stress was laid on the allegation that the responsible officers had by their inaction acquiesced in and consented to the contractor's proceedings in so far as those proceedings failed to satisfy the conditions of the contract. It must be clearly understood that mere forbearance is quite a different thing from acquiescence in a breach of contract. Forbearance is within certain limits and under certain safeguards distinctly commendable, like every other phase of liberal treatment. But there should be no mistake about it; no room left to twist it into a waiver of legal rights. A private case of recent occurrence could be quoted in which a house was sold. No particular date for payment was specified, but according to law (section 46 of the Contract Act) the buyer was bound to pay for it within a reasonable time. He failed to do so. The seller, much averse to litigation and unpleasantness generally, forbore to press him, and gave him extension after extension of time to pay in. The

Forbearance is not to be confounded with acquiescence.

* "He who remains silent seems to consent."

grateful purchaser's return for this generosity was an attempt to argue that the seller's own conduct proved that, as no particular time had been fixed for payment, he, the purchaser, could pay whensoever he pleased. It is therefore most essential that whatever concession of this (or any other) sort is made should be categorically limited in clear written terms to its true extent, and be clearly specified as without prejudice to the right to enforce the contract in its other elements; and the other side should be made to understand that, unless the concession be accepted on these conditions, it must be deemed to be withdrawn altogether.

Absolutely clear language and conduct indispensable

(5) Procedure on abandonment or other breach of contract

106. It is necessary for officers to know what to do in the event of a contractor throwing up the work or committing any other breach of the agreement. The first principle to bear in mind is that when a contract has been broken by one party, it is not necessarily at an end. The breach *entitles* the other party to put an end to the contract, but he is not *obliged* to do so (and, in the case of many particular sorts of contracts, the law of "specific relief" allows him to sue the offender for a decree compelling him to perform the contract), and he can either take this course, *viz.*, he can "put an end" to the contract, or else "signify, by words or conduct, his acquiescence in its continuance" (section 39 of the Contract Act). To allay a doubt expressed respecting the preceding sentence, it may be explained that it is not the offender, who has broken his contract, that has the option described, but the *other*, the *injured*, party who has that option. Hence the supreme importance, which cannot be too often or too forcibly expressed, of all officers expressing their intentions in a plain unequivocal way. The decision must, moreover, be *promptly* communicated. This point was of great consequence in Jones' case. If the decision be to put an end to the violated contract, let intimation in clear terms be sent, invariably on paper, and a copy being kept, stating beyond the reach of

Head II, Sub-head (5).

Breach only renders the contract *voidable* at the option of injured party

The decision must be *prompt*.

mistake that the contract is put an end to. If the intention be to let it continue, the terms on which this offer is made should be equally precise, and a definite acceptance or refusal of them, also on paper, should be insisted on. If the contractor cannot write, at least the officer concerned can do so, and in such case he should prepare a written record of what is settled and, having made it clear to the contractor's intelligence, should note on it the fact of his having done so. It is, however, as a rule most undesirable to let a mutilated contract run on. Generally speaking, it is much wiser to make a fresh departure altogether—a course which prevents complications. It is far easier to enter *de novo** into a fresh agreement from the bottom than to bring amended conditions safely into harmony with others previously arranged.

Generally wisest to make a fresh start.

State of the work must be at once recorded.

107. In the case of a contractor throwing up the work unfinished, it is of course important to secure without any delay a careful and exact record of the state in which he left it, whether for the purpose of limiting his future claims, of assessing Government's claims to compensation, or of securing clear proof of the amount of work remaining to be finished, no matter whether this is to be done departmentally or by a fresh contractor. A vast deal of evidence and discussion were expended on this particular point in Jones' case. Clear proof on the point is incidentally valuable also for the reason that it affords an accurate measure of the speed at which the contractor was working up to the date when he left.

Every agreement should clearly specify whether time is to be essential.

108. In this connection it may again be remarked that in every single contract, be it what it may, there ought to be a plain agreement as to whether time is "of the essence" or not. It is a constant subject of dispute. Nothing can be simpler than to stipulate whether it is or is not to be so.

(6) SQUATTERS.

HEAD II, SUB-HEAD (6).

109. A few remarks on the subject of squatters may be useful. It is often found necessary to permit

* "Anew."

contractors to build huts on Government ground for their workmen. Properly speaking, the contract should provide for removal of all such huts on the termination of the agreement. But if this point be overlooked, and the contractor is silently allowed to erect such huts, the law in respect of them is clear. According to law, on the one hand, the contractor is bound to remove the huts when his contractual relations with Government end, and can claim no compensation for the cost of either their erection or their removal; and he is bound to remove them with reasonable promptitude, failing which he becomes in respect of them a mere trespasser. On the other hand, he is by law clearly possessed of the above right, the Government having, as is assumed, acquiesced in the erection of the huts. He is entitled to all reasonable facilities for taking down and carrying away their materials. His case is generically different from that of a mere trespasser, who has erected a hut without the acquiescence of an officer competent to bind the Government by his acts Such a trespasser can be evicted and has no right whatsoever according to English law to re-enter Government land in order to remove his materials. Under that law they have passed to the owner of the soil. In India, however, the law is not so strict and the squatter would be allowed at the least to remove his materials. Had Government stood by while he built a 'pakha' building, Government might have to pay him compensation or even have to give up the land on receipt of its value. Each case depends on its own merits. The importance of *conduct* under the great law of estoppel is here well illustrated. The question is not whether the owner gave a *formal* consent to the other person's squatting: the question is whether by his words or by his conduct he acquiesced in it, just as, under section 39 of the Contract Act quoted above, the breach of a contract may be condoned either by words or by conduct Squatting should, therefore, be carefully watched, and all scope for the suggestion of acquiescence should be decisively forestalled.

The duties and rights at law of a contractor explained and distinguished from the different case of a mere trespasser.

Importance of *conduct* illustrated.

(7) GENERAL PRINCIPLES.

110. One or two general principles may be use- HEAD II, SUB-HEAD (7).

(1) Never threaten vainly.

fully stated. It is never expedient to threaten vainly. If a contractor has been fairly warned that in a certain event he will lose his contract, the threat should be enforced if the event occurs. If expedient, a fresh contract can be granted on less favourable terms and more stringent conditions, where this seems necessary; but no contractor should be allowed to go on breaking his agreement in defiance of explicit warning. Had this principle been acted on in Jones' contract, the case would never have come into Court. Again, the greatest practicable warning of enforcement of a penalty should always be allowed.* A contractor may be honestly desirous to do well, and may himself be deceived by his agents. Timely warning may enable him to set matters straight and take effective measures to keep them so. Rescission of a contract should be the very last resource, as usually involving both loss to the contractor and inconvenience to the Government. The former's failure may be due to difficulties of a serious kind foreseen by neither party. Cases of this sort should be liberally met by prompt enquiry and reasonable concession. One other principle may be again mentioned. The policy of the law is to minimise, so far as practicable, legal liability in damages by requiring the injured party to do what in him lies to himself repair the loss. Hence the Explanation to section 73 of the Contract Act, which requires the Courts, in estimating the loss or damage arising from breach of contract, to take into account the means which existed of remedying the inconvenience at the time when it occurred. The duty imposed on the injured party by this Explanation to section 73 should be scrupulously and industriously fulfilled.

Give utmost practicable warning to contractor.

Remember your duty under the Explanation to section 73 of the Contract Act.

111. The above remarks dispose of the second main head, and bring the subject to the final stage of a contract, *viz.*, that of its completion.

* See Chapter IX, Forms Nos. 8 and 10.

HEAD II.—POINTS TO BE OBSERVED ON COMPLETION OF A CONTRACT.

112. The following sub-heads seem worthy of remark :— SUB-HEADS OF HEAD III.

(1) Payment.
(2) Recovery of plant and stores.
(3) Removal of materials from Government ground.
(4) Record of documents.
(5) Memorandum regarding contractor.
(6) Memorandum of experience gained.

1.—PAYMENT.

113. It is surprising how frequently payments are made to persons not entitled to receive them, and how much legal trouble ensues from mistakes of this sort. The danger is aggravated by the legal principle so incomprehensible to the lay mind, yet none the less well-founded, that money once paid under a mistake of *law* can never be recovered back. It may be as well to explain very briefly this rule. Where money is paid to one person under the *bonâ fide* belief that he is another person,—*e.g.*, another man of the same name—or under any other *bonâ fide* mistake of *fact*, the Courts will assist the sufferer to recover his money. No principle of law is thereby violated. HEAD III. SUB-HEAD (1). The rule of law as to erroneous payments explained.

114. But if a person with a knowledge of all the *facts* makes a mispayment through sheer ignorance of the law in force in the country in which he resides, then the maxim comes in "*vigilantibus non dormientibus succurrit lex*,"* and it is an inflexibly settled rule that such money cannot be recovered back. Public policy, it is held, demands that people shall be watchful of their own interests. All litigation is an evil. None will be allowed where the need for it arises from neglect or ignorance of the law. Now, this rule is obviously of great practical importance to It applies only to payments under mistake of *law*.

* "The law succours those who keep awake, not those who slumber."

officers charged with the disbursement of public funds. It shows that they absolutely must understand who is and who is not entitled to receive payment, and must carefully pay to the right person only. This matter aptly illustrates the practical usefulness to executive officers of such parts of the Contract Act quoted in Chapter III of this Manual as relate to Agency and Partnership. These may have appeared technical and beyond the scope of an executive officer's responsibilities; but this is far from the truth.

Instances of the rule.

115. It will suffice in this place to give a few concrete examples of the consequences of neglecting the law in this particular.

The law as to *assignment* of debts.

116. *Case* (*a*). *Mehtab Sing's* case, already quoted at page 175 of this Manual. There, a certain railway had entered into a carrying-agency agreement with one *A*. *A* owed Mehtab Sing some money, and Mehtab Sing demanded from the railway payment of the sums due by the railway to *A*, and actually filed a suit for these sums against it. Without understanding the law on the subject of assignment of actionable claims, the Manager sent a subordinate to confess judgment for the sums admittedly due by the railway to *A*, and a decree by consent was passed against it (*i.e.*, against Government) for this amount in favour of Mehtab Sing. Hardly had this happened, when a third person, a valid assignee of the sums due from the railway to *A*, came in and demanded payment of these sums from the railway. Now, no erroneous payment to Mehtab Sing would avail the railway as against the valid assignee. As it happens, it was found possible to get the aforesaid judgment set aside on other legal grounds, and the Government was saved from having to pay twice over; but this was merely a lucky accident.

What person alone should be settled with as to *railway* claims

117. *Case* (*b*). A very common instance of settling with the wrong man is that of consignor and consignee of goods by rail. In the case already cited, in which the goods-forwarding note was stolen, the contract was, according to law, entered into with the consignee and not with the consignor at all. The

claim brought was set up by the consignor. The railway authorities in stating the case never attempted to question the consignor's right to come in under the contract, but the compiler of this Manual, after investigating the facts, defended the suit on this ground, and it was duly dismissed. Had the claim as made been settled with the consignor, it would have been competent to the consignee to have started up the very next day and demanded compensation; and this very incident actually occurred in an English case, where the railway had to ignominiously pay twice over.* It is not expedient to burden this chapter with a dissertation on the rather difficult question of law—valuable as such knowledge would be to railway officers—with whom in various circumstances the carrying contract is really entered into; but a carefully worked out table for their guidance, covering all the cases which arise in practice, would be extremely useful, and may perhaps be submitted by the present writer hereafter.

Mispayments to unauthorized agents, partners, etc.

118. *Case* (*c*). The cases of agents, partners, and joint Hindu families furnish numerous examples of mispayments Mulchand received numerous payments for which he gave receipts in his own name only instead of signing as agent for the firm to which the contract was given. It is needless to say that this fact was strongly pressed by Mulchand's pleaders in support of the contention that the contract had been given to Mulchand personally, and not to the firm. As it happens, the firm did not attempt to claim payment over again, and could in this instance have been successfully resisted if it had done so; but the general rule holds good, that a firm could ignore all payments improperly made to an unauthorized agent and could insist on being paid in a legal manner. Hence the extreme importance of always making certain that the person claiming money under a contract is the proper person to receive what is due. It may be well to here refer the reader to the notes at page 129 under section 251 of the Contract Act.

* Combs' case, 3 H and N, 1

As to payments to representatives.

119. Some useful questions have been asked as to the precautions under which alone a person, claiming payment of moneys due to a deceased contractor, should be recognised as his legal representative. The matter, however, is too complicated to admit of exposition here. It would form the subject of very useful rules for guidance, which might hereafter be circulated by authority. One rough and ready method of at the same time facilitating payments to representatives and also safeguarding to some extent the interests of Government would be to induce claimants to furnish thoroughly satisfactory personal security to refund all money paid to them, in the event of any other claim being made on account of the debt, within the period of limitation. The case of the death of a joint contractor has been dealt with under section 43 of the Contract Act.

Security for refund might be taken.

Suggestion for examination of Agreements

120. It has been suggested that together with all final bills the instruments of agreement should be submitted to the Examiner of Accounts for examination and, if need be, for criticism. In this way, any serious errors or omissions in agreements would be brought to light, and might be avoided for the future.

(2) RECOVERY OF PLANT AND STORES.

HEAD III, SUB-HEAD (2)

121. It is needless to point out that this is a subject requiring careful attention. As regards *plant*, it is the opinion of one officer that "no Government tools should be supplied, except in special cases, and in such cases the cost should be invariably deducted from the first bill paid, and the tools should not be received back into store, as constant disputes arise as to their value when returned." It will probably be the opinion of many that this principle cannot always be acted on in practice. For example, a Government engine or other expensive article may be practically indispensable to the efficient and economical performance of a comparatively small work to be done by contract; but no contractor undertaking so light a job would care to buy the machine for it. It is probable, too, that in many instances petty contractors could not afford to take over Government tools except on

Frequently unavoidable to lend tools and plant.

loan. The subject is a very difficult one, and has led in a recent case of great magnitude to considerable trouble. When the contractor will not buy the tools outright, it would seem to be chiefly important to secure clear agreement and proof at the outset on the following points :— Points to be made clear in lending them.

(a) the exact quantities and kinds of tools lent :

(b) their condition and value when lent :

(c) that the tools are delivered to a duly authorised agent of the contractor, if not to him in person :

(d) the allowance which is to be made for fair wear and tear :

(e) provision of a competent person as final arbiter as to the condition of the tools on return, and the sum, if any, payable in respect of them.

(f) provision for a right to deduct such sum from moneys due to the contractor

(g) the clearest possible provision as to the official to whom alone the tools may be returned, and whose receipt alone will bind the Government.

122. It has been asked whether it is not possible to lend tools to a contractor on the condition that, in the event of any of them being lost, a deduction will be made of the full book value. Such a condition is quite possible. The whole subject demands careful discussion, with a view to the framing of rules. Some excellent suggestions have been received by the compiler, to which space forbids further reference here One question, however, may be briefly answered. If a contractor who has been deprived of his contract has Government tools, etc, in his possession, on his own premises, and will not surrender them, it is not open to any officer to enter and seize them Unless the matter can be settled by aid of the arbitration clause, there is nothing for it but to resort to legal proceedings; a civil suit certainly, and possibly a prosecution (under legal advice) for criminal misappropriation, may be instituted. What is to be done if a contractor refuses to return tools, etc

Same remarks apply to *stores*.

123. As regards *stores*, the above remarks seem equally applicable with verbal alterations. It may be remarked as to both tools or other plant and stores that the question is one which should invariably be settled promptly. Sums due from the contractor in this connection should certainly be deducted before the final settlement with him, and it is most important to avoid the necessity of retarding the final bill by delay on this or any other account. It has been observed by a competent authority that punctual measurements and payments prevent many disputes. It may be added that they are a distinct benefit to businesslike contractors, whom it is so desirable to encourage.

All things lent should be settled up before final payment, and that payment should never be delayed.

(3) REMOVAL OF MATERIALS FROM GOVERNMENT GROUND.

HEAD III, SUB-HEAD (3).

The parties can agree as they please, except as is disallowed by law.

124. A good deal of trouble is at times caused by contractors who fail to evacuate the land temporarily made over to them. The broad general principle governing all these cases is this:—so long as the conditions of the contract are not contrary to public policy as unreasonable, are not illegal or immoral, or anywise declared by the law to be invalid [as to which point a good deal has already been said in this chapter in Head I, Sub-head (5)], the parties can agree to whatever they please. Now there is nothing illegal or otherwise invalid in a contractor's undertaking to forfeit absolutely to Government whatsoever he leaves lying on Government ground beyond a reasonable period after completion of the contract. When, moreover, that reasonable period has expired, the contractor's license to enter on the land for the purpose of removing what had been his property, whether tools, or scaffolding, or huts, or materials whatsoever, is at an end. Thereafter, if he enters, he is a mere trespasser, and his entry can be forcibly resisted by those lawfully in possession on behalf of Government. So can his attempt to remove property which, under the agreement, is now no longer his at all. The reviser is, however, of opinion that the course here suggested is inadvisable—a condition that the material should

become the property of Government would open the door to a plea that the condition was in the nature of a penalty and that under section 74 of the Contract Act only reasonable compensation was recoverable and Government might well be involved in litigation. The condition entitling Government to clear the ground and recover the cost thereof as suggested in the next paragraph would be far preferable.

How Government is to recover cost of clearance by itself.

125. It has, however, been pertinently remarked by one officer that the Government does not require rejected materials (or other useless articles). what it does want is that they shall be removed, but that it shall not be put to the unnecessary expense of removing them. It is also asked whether in the event of Government's having to clear the ground (where the contractor was legally bound to have done so) it is legal to recover the cost from sums due to the contractor. Such deductions would be quite legal if made out of sums due to the contractor *on the same transaction*, and could be pleaded as a "set-off" to any claim brought by him; see the remarks on this point at page 97 Even sums due to the contractor on *other* transactions could be legally withheld in this way, if (to quote order VIII rule 6 of the Code of Civil Procedure) in both transactions the parties "fill the same character." This is, however, rather a delicate legal point, much better avoided in practice by the simple expedient of providing expressly in the agreement itself that the Government shall have power to clear the ground unless the contractor does it himself within a stated time, and shall also be entitled to recoup itself out of sums due to the contractor on any transaction whatsoever. This matter would be suitably provided for amongst the "standard conditions" recommended elsewhere in the Manual. The reviser suggests that every contract should contain a condition empowering Government to retain moneys due under it to a contractor against, or as a set-off to, moneys due to Government by the contractor on any transactions whatever. A further safeguard would be to require the contractor to give adequate security for due performance by him of his undertaking to clear the ground.

The law of "set-off."

HEAD IV.—HOW TO PREPARE AND SEND UP A CASE FOR LEGAL ADVICE AT ANY STAGE IF A DISPUTE OCCURS.

SUB-HEADS OF HEAD IV.

135. The following sub-heads require comment:—

(1) The need to realize the position of the legal adviser.

(2) The duty to state all relevant facts favourable or adverse.

(3) The consequences of stating a case incompletely.

(4) The duty to preserve evidence quoted in the stated case.

(5) Form in which the case should be stated.

(1) THE NEED TO REALIZE THE POSITION OF THE LEGAL ADVISER.

HEAD IV, SUB-HEAD (1).

Officers fail sometimes to realize what may in reality be highly material facts.

A good example cited.

136. An able officer has remarked as follows: "It is very curious how strange the modes of thought of a legal adviser appear to the lay mind when a case which appears as clear as day to the latter is submitted for opinion to the former." Now, it is precisely because executive officers fail to realize the position of the legal adviser himself and the character and extent of the difficulties which beset the course of a case in the law-courts that his 'modes of thought' and his demands appear to them so strange and at times unreasonable. How absurd and vexatious, for example, would the Manager of the Railway not have considered a demand by his legal adviser, prior to the trial of the 'collision case,' for clear, positive proof that the carriage No. 437 in which the plaintiff was travelling when the collision occurred was actually the vehicle called into Lahore, at the request of the legal adviser, for inspection at the trial! Yet it is none the less a fact that in the course of this case it was calmly suggested by the plaintiff's pleader that, in order to bring forward a carriage of which the internal fittings favoured the defence, the railway officials had deliberately unbolted the number-plate 437 from the true vehicle and bolted it on to another and, in order to simulate the weather-worn painted

number on the frame of the carriage, had by the use of some dirty old white paint transferred the same number to the selected carriage with a specious appearance of age. A better instance of the need to be prepared at all points,—to anticipate the most far-fetched and moreover insulting suggestions by the opposite side,—could hardly be imagined. Thus it comes about that legal advisers frequently ask questions which appear entirely vexatious, while in reality their bearing on the case may be none the less important.

137. Again, officers are apt to forget that legal advisers start in total ignorance of every fact surrounding the case, and also that they are not experts. It is not contended that every professional or moderately technical term used in the statement of a case must be explained; but, on the other hand, legal advisers are not engineers or traffic experts any more than these classes of experts are trained lawyers, and it is not to be overlooked that what "appears as clear as day" to a trained mind may very well be unintelligible to the lawyer without his having any reason to be ashamed of the fact.

Legal advisers are not experts in engineering or the like.

138. In order, then, to efficiently state a case for opinion, the first principle is to steadily remember that the legal adviser knows nothing whatsoever of the facts, and as regards technical matters has, practically speaking, no special knowledge. The facts stated and referred to should therefore include all relevant information, to be expressed in language intelligible to any educated person. Neither local, personal, nor technical knowledge should be taken for granted unless the officer concerned happens to be aware in the particular case that the officer consulted does possess such knowledge.

First principle,—assume no special knowledge on the legal adviser's part.

(2) THE DUTY TO STATE ALL RELEVANT FACTS FAVOURABLE OR ADVERSE.

139. The next principle is to bear in mind that every known fact relevant to the case should be stated, the greatest care being taken in particular to mention all that tends or seems to tend to support the opposite side. It is the blindest folly to suppress such facts;

HEAD IV, SUB-HEAD (2). Next principle,—state *the whole of* the facts fairly

yet the compiler of this Manual could specify an instance in which facts of this class were left out, and with signally disastrous results, from the case as submitted for opinion. A legal opinion, it must be borne in mind, is invariably expressed "on the facts as stated." The adviser accepts no responsibility whatever for the correctness or completeness of those facts. Of course, if he detects a gap or sees reason to think that facts favourable to either side have been—inadvertently or otherwise—omitted, he would (or ought to) enquire about them before expressing his opinion: but he may or may not detect such matters, and he may or may not make such enquiries: if he does not, and an opinion is given, correct on the facts stated, but altogether unsound on the whole of the facts as they really exist and can and (so far as they are favourable to the other side) pretty surely will be proved at the trial, the department on which the discredit of defeat will fall has only itself to thank. It is in this connection that the great *practical* value to executive officers of Chapter II of the Evidence Act, on the relevancy of facts, comes in most markedly, and that perhaps the clearest explanation of the inclusion of much of it in this Manual can be found. Those officers who know best what facts are relevant, whether for or against them, will best guide the course of contracts in their charge, will best state their own case, and best anticipate and rebut the line of attack which their adversaries will adopt.

Legal opinions always given "on the facts as stated."

Hence practical value of understanding the 'relevancy of facts.'

140. It is not merely expedient on selfish grounds to state all known facts bearing on the case: it is, moreover, a clear and positive duty. This fact is well expressed in the following extract:—

To state the facts fairly is also a positive duty.

"The object of Government in sanctioning either the institution or defence of any suit is simply to establish the truth; and whilst Government expect the utmost vigilance and care on the part of those entrusted with the conduct of litigation on their behalf in asserting and protecting their just interests, they would impress upon pleaders who have the charge of cases that they will not countenance any attempt to snatch an unfair advantage by the withholding of important evidence, or by any disingenuous proceeding whatever."

And these remarks are at the least as applicable to

executive officers while the subject-matter of future litigation is in their hands as to pleaders entrusted with the conduct of a case in Court.

141. The general rule may be here stated that when an officer is doubtful of the relevancy of any particular fact, his best course is to state it, and not to omit it.

Third principle,—if uncertain of relevancy, state the doubtful fact.

142. It is perhaps desirable to specially draw attention here to sections 19 and 20 of the Limitation Act, quoted in Chapter V *supra*.

143. Reference to subsequent communications with, and payments made to, the opposite side should always be included in the statement of a case; they may have a most important influence, or none at all, on the legal position of the parties. Their bearing should assuredly be examined before a decision to fight or to submit is reached. A private case recently occurred (already referred to in this Manual) in which legal advice was taken on a stated case. Nothing was said, inadvertently, about a communication conveyed at a late stage, long after the breach of contract was complete, to the proposed defendant, intimating that the injured party had resolved to finally drop the matter. Now it turned out, as it happens, that the defendant was not as a fact induced by this message to "alter his position to his prejudice." But suppose that, on receipt of the message, regarding the incident as closed, he had burnt all his papers connected with it, and had thus weakened his legal position. In such a case, on the admirable principle of "estoppel" already explained at some length *supra*, this fact would have afforded a complete defence to the suit subsequently filed against him, and the plaintiff's legal adviser would have been the first to tell him so, had the incident in question been brought to his knowledge when he was consulted.

Fourthly—always mention communications with, and payments to, the other side.

(3) THE CONSEQUENCES OF STATING A CASE INCOMPLETELY.

144. It is necessary to realize the inevitable consequences of sending up a case for opinion in a patently incomplete form. The adviser has two courses only

HEAD IV, SUB-HEAD (3).

(5) FORM IN WHICH THE CASE SHOULD BE STATED.

HEAD IV, SUB-HEAD (5). (1) References on a single point.

146. There are two classes of reference—one, where legal advice is desired on a specific point only, and the other, where it is proposed to institute or defend a suit at law if so advised. The former class of reference is comparatively simple: the exact point referred should be stated, and then, as concisely as completeness permits, the relevant materials for decision should be marshalled. Herein the officer will utilize his knowledge derived from a study of the few Acts, portions of which are printed in this Manual. It must never for a moment be forgotten that (as has already been partly explained) a lawyer will readily *accept as correct whatever facts are stated to him* as proved without in the least concerning himself or delaying his disposal of the reference to investigate the conclusiveness of the evidence (if any) deemed to establish those facts. This remark would be omitted as superfluous, had not the compiler of this Manual quite recently experienced considerable difficulty in making the point clear to an officer of long standing and ability.

(2) References of whole cases.

147. Where a dispute has arisen, and it appears desirable to set out the whole case and obtain legal advice as to the institution of a suit for damages or the defence of one if instituted by the other party, the case would with advantage be stated, so far as may be necessary, on the lines of the report which is to be submitted when an officer definitely proposes such litigation. The form of this report varies in different provinces, but that in force in the Punjab may be selected as a guide. It is contained in the Punjab Civil Suit Rules 8 and 16. Rule 17 prescribes who should prepare the report and through whom and to whom the report should be submitted. The Suit rules in question are given in appendix D.

The directions illustrate the necessity of understanding something of the Laws quoted.

148. An attentive examination of the directions contained in the rules will convince the reader that without adequate knowledge of the law applicable, it would be difficult, if not impossible, for any person to competently comply with them. They postulate

acquaintance with the substantive law giving rise to the right to sue, with the Law of Evidence, with the Law of Registration, with the Law of Stamps (since documents not satisfying that law are inadmissible in evidence), with the Law of Limitation, and, in particular instances, with the Transfer of Property Act or other special Act under which the matter falls. No suit can be instituted against Government until the expiry of two months from the service of a 'notice of action' upon the Collector of the District or upon a Secretary to the Local Government in manner prescribed by section 80 of the Code of Civil Procedure. It is hoped that the extracts reprinted from the more generally useful Acts, and the foregoing remarks, will to some extent overcome the difficulties which surround this subject, and will enable executive officers to more fully appreciate the "modes of thought" of a legal adviser. They may rest assured that nothing can be further from his wishes than to cause them needless trouble. He may ask for information the relevancy of which is not apparent; but it is quite certain that, if for no better reason than to save himself the labour of calling for it, he will never ask to be furnished with particulars which he does not believe to bear materially on some part of the case.

Suits against Government,—notice of action required.

Legal advisers do not ask for more capriciously.

HEAD V.—General principles which it is desirable to observe in dealing with contractors.

Head V. 149 This subject can be disposed of in very few words. Neither argument nor illustration is necessary in aid of the propositions submitted. These propositions are, however, exceedingly important, and unfortunately they are not in all cases observed. The following passage, for which the compiler of this Manual is responsible, embodies the views which it is desired to advance :—

"It may be premised that the plain duty of every Government officer is to be just and liberal in his transactions with the public, and that in considering claims advanced, so long as those claims have not passed into actual litigation, it is obviously incumbent on him to weigh them upon their merits—in short, in the spirit of honourable and upright dealing between man and man. Whether the matter be regarded from the stand-point of justice, equity and good conscience, or from the sordid one of pecuniary self-interest alone, the conclusion is identical. The honour of Government is involved in the even-handed administration of all its commercial undertakings. A public officer who takes any unfair advantage of private persons doing business with him as such disgraces his employer. It is a satisfaction to know that this principle has already been emphatically declared, and to here quote orders which, although only provincial, are *of universal applicability, and cannot be too widely made* known. 'The special attention of all officers is also drawn to rule 31, (*a*) which enunciates the principle that no person having a just claim against Government should be compelled to resort to litigation to enforce it, and directs all officers of Government to make all reasonable attempts to bring about amicable adjustments of disputes. The object of the notice of suit prescribed by section 424 (*b*) of the Civil Procedure Code is to allow ample time for inquiry into, and settlement of, all just claims against Government, and the Lieutenant Governor expects all officers to make the best use of the opportunity of equitably and amicably adjusting such claims given by this provision of the law.' The High Court, North-West Provinces, has also well expressed the same view of the intent of a similar section in Act XV of 1873 at page 113 of Vol. IV of the Indian Law Reports, Allahabad series. The pecuniary interests of Government no less clearly require that its busi-

(*a*) Now rule 2.
(*b*) Section 80 of the present Code.

ness transactions shall be conducted in an impartial and conciliatory spirit. Sharp practice may overreach a confiding contractor once, and may thus put a certain amount into Government's pocket. But conduct of this kind speedily becomes notorious, and brings its own reward. No sensible person will deal on the same terms with an officer known to be unscrupulous which would be deemed remunerative enough if fair treatment of unforeseen differences might safely be relied upon. Thus the direct result of departmental harshness, chicanery, or quibbling when once discovered is that on all future occasions the guilty department will have to pay those contracting with it at heavier rates, enhanced against Government by way of a special insurance against similar oppression, until a fairer policy again prevails and confidence is restored. *We fear that the cases, exceptional though they* doubtless are, in which these obvious principles are overlooked, are not as rare as they ought to be. Energetic officers are naturally keen to demonstrate that their particular department is remunerative to the State, and financially creditable to their own administration of it. This desire is apt to blind them to the real merits of differences arising between them and private persons, and to betray them into conduct which provokes the reflection that Government officers will descend to official meannesses of which as private individuals they would be ashamed." (*a*)

150. If officers will only remember that it is to the common advantage of themselves, of the Government, and of all deserving and competent contractors to allow fairly remunerative rates to those dealing with any department of Government, to approach unforeseen difficulties in a fair and liberal spirit, and to conciliate contractors by courteous and ready help where wanted, they will not regret it. Their great aim should be to carefully choose good men in the first instance,—to make it worth the while of such persons to render good service,—and, so far as possible, to steadily re-employ them on future occasions in preference to strangers.

(*a*) The important portions of this paragraph are incorporated in the Punjab Civil Suit Rules (appendix D) which should be referred to

CHAPTER IX.

MISCELLANEOUS FORMS OF NOTICE.

ABSTRACT OF THE CHAPTER.

Various intimations to contractors and others become necessary from time to time. These should invariably be given in writing, an exact copy being retained and safely kept. Now, of course, there is a right way, and there are many incorrect ways, of wording such notices. It may be useful by compiling a few of the forms most commonly required to save officers both the trouble of drafting these notices and also the risk of issuing them in defective terms. The following samples can be indefinitely added to hereafter:— *Forms why useful.*

No. 1.—It is often desirable, for the sake of peace, to make propositions of settlement to the other side. An offer of compromise, however, not expressly *No. 1.—To utilize section 23 of Evidence Act.*

acceptance, if any, should be [e.g., *in writing, signed and witnessed*]. You have not complied with my said stipulation, and I hereby beg to inform you that I decline to accept your acceptance and require you to communicate it in the prescribed manner and not otherwise.

[*Date.*] [*Signature and designation of officer.*]

No. 5.—To compel performance in conformity with false representation.

No. 5.—When consent to an agreement has been caused by fraud or misrepresentation, the deceived party may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true. (Section 19 of the Contract Act.) In a case of this kind the following notice might suit:—

To—A. B. [*contractor's name, etc.*]

SIR,—I find that my consent to your contract [*here briefly but clearly describe the contract*] has been caused by misrepresentation [*or fraud, as the case may be*] on your part, in that you untruly stated that [*here briefly but clearly describe the fraud or misrepresentation: e.g., that you owed a deposit of Rs. 500 in the Government Savings Bank and would assign the same to Government as security*]. I beg to hereby give you notice that I require you [e.g., *to forthwith deposit the said sum and to assign the same to Government as such security*], in order that the contract may be duly performed.

[*Date.*] [*Signature and designation of officer.*]

No. 6.—For urgent cases.

No. 6.—For use when practical exigencies oblige an officer to consent to a contractor's immediately commencing work—(*a*) *before the whole of the terms* of the contract have been definitely *agreed upon*, (*b*) before those terms have been embodied in a *formal document*, (*c*) before the contract has been agreed to by the officer alone *empowered to bind* the Government (*d*) *before fulfilment of a condition* to which the giving of the contract is intended to be subject (*e.g.*, the production of certificates sent for from a distance and not yet received), or (*e*) *before any other such necessary preliminary* has been accomplished:—

To—A. B. [*contractor's name, etc.*]

SIR,—With reference to my permission to you to commence work on [*here briefly but clearly describe the proposed*

contract] before [*here insert the substances of clause* (*a*), *or* (*b*), (*c*), *or* (*d*), *or* (*e*) *stated above, as may suit the case*], you will please to understand distinctly that, pending completion of the above-named matter, you acquire no rights whatsoever against Government except to be paid at a reasonable rate for work actually done by you until you are directed to stop work, and that on being so directed you will be bound to stop work forthwith and to settle up without delay.

[*Date.*] [*Signature and designation of officer.*]

No. 7.—To address to representative of deceased contractor.

No. 7.—Where it is not necessary from the nature of the case (as it is in the case of a contract to paint a picture), and it was not the intention of the parties, that the contractor should perform the promise in person, he is entitled to employ a competent person to perform it, and his representatives have the same right after his death: they are also *bound* to arrange for such performance. As soon as a contractor's death occurs, the officer responsible for the contract must decide what is to be done about it in cases of this sort.* The following form of communication to the person believed to be the deceased's legal representative may be useful:—

To—C. D. [*name, etc., of legal representative.*]

SIR,—As A. B. [*name, etc., of contractor*] is dead, and you are, I understand, his legal representative, I beg to inform you that his contract to [*here briefly describe the contract*] is unperformed, and I request you to employ a competent person to complete it conformably to its terms according to law [If the officer wishes to give the representative the option of dropping the contract, he can do so. In such case, instead of the last nineteen words, he would say—" . . . . . is unperformed. If you wish to be permitted to abandon the contract, I request you to formally apply to me for such permission without delay "]

[*Date.*] [*Signature and designation of officer.*]

No. 8.—To warn peccant contractor.

No. 8.—When a subordinate officer in charge, not legally competent to modify a contract, sees that the contractor is breaking its terms, it is desirable that the contractor should be pulled up without delay. This course prevents any suggestion of "acquiescence" on the part of Government, although of course there can be no true acquiescence except by an officer

* The above applies to the case of a sole contractor. In the case of partners see the notes in page 88.

legally competent to make, and thereafter to modify, the contract. Still, the compiler of this Manual has known a hard-fought law-suit to result from apparent acquiescence on the part of a local officer who certainly ought not to have remained silent when the illegal acts in question were going on before his face. Warning to the wrong-doer can be conveyed as follows :—

To—A. B. [*name, etc., of contractor.*]

SIR,—I observe that in the performance of your contract to [*here briefly but clearly describe the contract*], you are violating its conditions by [*here briefly but clearly describe the breach*]. I hereby give you notice to abide strictly by the terms of the agreement. I shall report the matter to the proper officer for such action as may be deemed expedient.

[*Date.*] [*Signature and designation of officer.*]

Note.—The "proper officer" is the officer by whom the contract was made. If the contract expressly provides that any *other* officer shall have power to put an end to it, the report should be made to him also.

No. 9.—To rescind a contract.

No. 9.—When it is desired to put an end to a contract for breach of it by the other party the terms in which such rescission is intimated cannot be too carefully chosen. It is expedient to plainly set out the condition relied upon and the infraction alleged; and the notice that the contract is put an end to should be couched in unmistakable terms. A vexatious dispute over a brick-field occurred simply in consequence of the feeble and limping terms in which the self-styled contractor was addressed—a peculiarly bad case, inasmuch as no contract had ever really been given to him at all. Officers should invariably be explicit and distinct in their action. The following form marked I appears suitable for use; of course it does not apply to rescission *without* cause stated, made in exercise of special power to terminate the contract with notice. For such a case, the form marked II is suitable : —

I.

To—A. B. [*name, etc., of contractor.*]

SIR,—According to your contract to [*here briefly describe the contract*] you were bound [*here state the condition violated: e.g., not to sublet the contract without due consent previously obtained*]. Having learnt that you have violated

the said condition by [*here state the breach: e.g.* by subletting *the contract without my consent first obtained*], I hereby give you notice that your contract is rescinded, and I request you to be so good as to submit your bill forthwith for work done by you under the contract* and not already paid for.

[*Date.*] [*Signature and designation of officer.*]

II.

To—A. B. [*name, etc., of contractor.*]

SIR,—According to article of your contract to [*here briefly describe the contract*] it is competent to Government to put an end to the same by giving you [*here enter the period provided*] notice in writing. I hereby on behalf of Government give you the said notice and intimate that your contract will on the day of 19 be at an end.

[*Date.*] [*Signature and designation of officer.*]

No. 10.—To claim compensation for breach.

No 10.—For use when, in a similar case to No. 9 above, it is intended to claim compensation for loss occasioned on the whole contract and not to rescind the contract. This will arise in cases where goods have to be delivered in instalments and a default occurs in one instalment. Where it is desired to claim compensation on account of anticipated subsequent defaults the contract should not be cancelled but the goods should be purchased at the contractor's risk as each default occurs.

To—A. B. [*name, etc., of contractor.*]

SIR,—With reference to clause of your contract dated you were bound to [*here insert whatever the contractor was bound to perform under the said clause*]. You have failed to [*here insert the breach*] and have thereby failed to carry out the terms of the said contract. I hereby give you notice that Government will forthwith purchase at market rates the goods you have failed to deliver as aforesaid and that Government will claim compensation from you on account of any loss that may be occasioned by your breach of contract.

[*Date.*] [*Signature and designation of officer.*]

No. 11.—To warn contractor to be diligent.

No. 11.—For use when, according to the contract as made, time is not "of the essence," but the contractor is *not using reasonable diligence*, as he is bound

* NOTE.—Payment for such work is due to the contractor, under section 65 of the Contract Act.

by law (section 46 of the Contract Act) to do, and it is desired to warn him:—

To A. B. [*contractor's name, etc.*]

SIR,—With reference to your contract to [*here briefly but clearly describe the subject-matter of the contract*], I beg to draw your attention to the fact that, although the contract is silent as to time, you are bound by law to perform your engagement within a reasonable time, and that unless you immediately make adequate arrangements to complete the performance by the day of at latest, * you will indisputably fail in this respect, and will be liable to have the contract rescinded forthwith, besides incurring other legal liabilities.

[*Date.*] [*Signature and designation of officer.*]

No. 12.—To comply with requirements of section 55 of Contract Act.

No. 12.—For use when time is of the essence of the contract, and, the promisor having failed to perform his promise at the time agreed, the promisee decides to *accept performance later on, but intends to claim compensation* for the breach of the time condition, and, as is required by law, gives notice of such intention at the time of such acceptance (section 55 of the Contract Act):—

To—A. B. [*contractor's name, etc.*]

SIR,—Time being of the essence of your contract to [*here briefly but clearly describe the subject-matter of the contract*], and you having failed to perform your engagement at the time agreed, I beg to hereby give you notice, in deciding to accept for the Government performance after the said time, that the Government will claim the compensation to which it is entitled by your non-performance at the time agreed.

[*Date.*] [*Signature and designation of officer.*]

No. 13.—To rescind contract before prescribed date has come.

No. 13.—For use when, time being of the essence of the contract, the officer who gave the contract sees, from such progress as has been made up to date, that complete performance by the prescribed *future* date is quite impossible. To get the work done he must make other arrangements. To make other arrange-

* NOTE.—The officer must decide what is "reasonable time" in the particular circumstances of the case, and enter a date slightly later, so as to be incontestably on the safe side on the point if the matter goes into Court.

ments, he must put an end to the contract, which he is empowered to do by section 39 of the Contract Act. For such a case, the following notice is suitable :—

To—A. B. [*contractor's name, etc.*]

SIR,—Time being of the essence of your contract to [*here briefly but clearly describe the subject-matter of the contract*], and you having now unquestionably disabled yourself from performing your engagement by the time agreed, I beg to hereby give you notice that your contract is rescinded, and I request you to be so good as to submit your bill forthwith for work done by you under the contract* and not already paid for.

[*Date.*] [*Signature and designation of officer.*]

No. 14.—For use when a contractor is orally permitted in urgent circumstances to deviate from the terms of the contract as made, (*a*) by an officer who *had not the power to make* the contract, or (*b*) by the officer who made the contract, but the permission to deviate is given in urgent circumstances *not admitting of a formal record* at the time in writing of the modification allowed :—

No 14.—For urgent cases where deviations are allowed.

[In case (*a*)]

To—A B. [*contractor's name, etc.*]

SIR,—With reference to the modification of your contract, namely [*here briefly but clearly describe the contract and the modification of it*], provisionally approved by me to-day [*or other date, (naming it)*] you will please to understand that the said modification is subject absolutely to ratification by [*here enter the designation of the officer who gave the contract, not his name*] and to your settling with him the terms of the necessary formal amendment of the contract deed [*or deeds*] and executing the instrument [*or instruments*] requisite to embody the same as soon as may be practicable.

[*Date.*] [*Signature and designation of officer.*]

[In case (*b*), the notice would run as above down to 'the said modification,' and then thus :

'is subject absolutely to your settling with me the terms of the necessary formal amendment'

etc., to the end.]

* NOTE —Payment for such work is due to the contractor, under section 65 of the Contract Act.

No. 15.—Sample of agreement to modify a contract.

No. 15.—When it is desired to modify the terms of a contract, all the considerations discussed at pages 249—252 of the Manual should be duly borne in mind. The proposed modification must be—

(*a*) clearly understood by both parties;

(*b*) expressed in unmistakable language;

(*c*) carefully studied before acceptance, in order to work out its indirect results on the other terms of the contract, and the necessary additional modifications must also be settled as to all those other terms;

(*d*) effected in a legal manner;

(*e*) by an officer who had power to enter into the original agreement and who also has power to contract according to the fresh terms agreed on.

A sample of a very simple agreement to modify a common class of contract—for the supply of sleepers for a railway at a given place in a given time—is appended, which may be used as a general guide:—

WHEREAS on the day of 19 , an agreement was entered into between the Secretary of State and A. B. [*name and description of contractor*] under which the said A. B. among other conditions contracted to deliver ten thousand sleepers under a specification therein contained at Multan on or before the first day of January 19 : and whereas the said parties are now desirous of modifying the said agreement in certain particulars, it is hereby agreed as follows:—

First, that the said A. B. shall deliver twenty thousand sleepers, of the same quality and description and at the same price per sleeper, instead of ten thousand:

Secondly, that the whole twenty thousand sleepers shall be delivered at Sher Shah, and none at Multan:

Thirdly, that the latest date of delivery shall be the first day of February 19 , for the whole twenty thousand sleepers, and that none shall be deliverable at latest on the first day of January:

Fourthly, that the aforesaid agreement shall still hold good in all other particulars.

In witness thereof the said parties have hereto set their hands at , this day of . 19

[Here should follow the signatures of both parties, witnessed in the usual manner.]

No. 16.—When it is intended to partially remit performance of an agreement, it is most necessary to specify, and thus clearly limit, the extent of remission. A case is quoted in the Manual* where, merely because the seller of a house kindly extended the time for payment, the buyer afterwards tried to make out that he had power under the contract to pay *whenever he pleased!* A simple form of communication which would suffice in the case of ordinary, unregistered, agreements is as follows :— No. 16.—To embody partial remission of terms.

To—A. B. [*contractor's name, etc.*]

SIR,—Whereas under your contract [*here briefly describe the contract*] you are bound to [*here briefly but clearly specify the condition which it is intended to partly remit:* e.g., *to complete work by the first day of next June*], I hereby inform you that performance of the said condition is remitted, and that in lieu of such performance you are hereby authorized to [*here clearly specify the modified performance agreed to* e.g., *to complete the work by the last day of next July.*] In all other respects the contract is to remain in full force.

[*Date.*] [*Signature and designation of officer.*]

No. 17.—For use when there has been a breach of warranty in respect of "unascertained" goods, but the buyer accepts the goods and intends to claim compensation, and, as required by law, gives notice of his intention to do so within a reasonable time after discovering the breach of the warranty (section 118 of the Contract Act) :— No. 17.—To comply with requirements of section 118 of Contract Act.

To—A. B [*contractor's name, etc.*]

SIR,—Having discovered that you have committed a breach of the warranty in respect of the unascertained goods sold by you to Government [*here briefly but clearly specify the contract*], I beg to hereby give you notice that, although

* At page 252

I have on behalf of Government accepted the goods, the Government intends to claim the compensation to which it is entitled by your breach of warranty.

[*Date.*] [*Signature and designation of officer.*]

No. 18.—To notify rejection of goods under section 118 of Contract Act.

No. 18.—When, in the case last mentioned, the buyer's decision is to refuse to accept the goods—it should be explained here that the law (section 118 of the Contract Act) allows him to keep the goods for a time reasonably sufficient for examining and trying them—his notice would be in the form just given, down to "notice": from that point it should run thus:

"That I refuse to accept the goods." [Or, if delivery has been taken with a view to examination of the goods, "that, having examined the goods I decline to accept them, and I hereby give you notice that after (*here name a reasonable period*) they will lie entirely at your risk, and should be removed by you forthwith."]

[*Date.*] [*Signature and designation of officer.*]

No 19.—To offer to accept a portion of warranted goods.

No. 19.—If on such a sale as is referred to above in No. 17 it be found that *part* of the goods satisfies the warranty while *part* of them does not, the buyer is free to reject the whole and to claim compensation, or to accept the whole, reserving his right to claim compensation · he cannot pick and choose, accepting part and rejecting or claiming damages in respect of part. But he can *offer* to do so if the seller agrees to that course. Such an offer might be worded as follows:—

To—A. B. [*name, etc., of seller.*]

SIR,—Having discovered that part of the goods tendered by you under your contract to supply [*here briefly describe the contract*] does not fulfil the warranty, I beg to give you notice that I decline to accept the whole. I however hereby offer to accept the part of the goods which satisfies the warranty, namely [*here specify the quantity approved of*], without prejudice to the rights of Government in respect of the remainder. This offer will be deemed to be rejected unless you accept it in writing by a letter received by me on or before the [*here enter a date giving the desired period.*]

[*Date.*] [*Signature and designation of officer.*]

No. 20.—To obtain surety's consent

No. 20.—As a surety is, under section 133 of the Contract Act, discharged for the future by any

variance made without his consent in the terms of the contract between the principal debtor and the creditor, and is wholly discharged, under section 135, by any contract between these two, made without the surety's consent, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor,—it is imperatively necessary to secure the surety's consent before any such variance or contract is made. His consent can be applied for in the following terms .— to variance or composition, etc.

To—A. B. [*surety's name, etc.*]

SIR,—As you have guaranteed the performance by C. D. [*name, etc , of the principal debtor*] of his contract with the Government to [*here briefly but clearly describe the guaranteed promise*], I beg to inform you that it is proposed to [*here clearly set out the proposed variance, or composition, or extension of time, or arrangement not to sue*], and I beg to enquire whether you assent or not to the proposed arrangement.

[*Date.*] [*Signature and designation of officer.*]

No. 21.—The bailor of goods is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks (section 150 of the Contract Act) Proof of due intimation of such faults may be indispensable, if an accident occurs. The notice might be worded as follows :— No 21 —To warn bailee of faults in bailed goods.

To—A. B. [*name, etc., of bailee.*]

SIR,—With reference to the provisions of section 150 of the Contract Act, I beg to inform you that the [*here briefly describe the goods bailed, e.g , the steam Road Roller*] bailed to you by Government has the following fault [*here clearly describe the fault, e.g., when there is 20 lbs. of steam in the boiler, the steam-gauge registers zero, and so on, always registering 20 lbs. less pressure than the correct amount*]; and I request that you will duly note this fact.

[*Date.*] [*Signature and designation of officer.*]

No. 22.—In corresponding as to unfounded claims, especially when they are more or less 'stale,' No. 22 —To guard against operation of

Sections 19 and 20 of Limitation Act

and in making payments where larger sums are claimed but are not due, it is most necessary to guard against the allegation of admissions under section 19 or section 20 of the Limitation Act. This can be prevented by coupling the reply or the payment with some such notice as the following :—

I.

As to acknowledgments under section 19.

To—A. B. [*name, etc., of contractor.*]

SIR,—In replying to your communication dated the , I beg to premise distinctly that I make no acknowledgment whatever of any liability on Government's part towards you, and that this letter is 'without prejudice.'

* * * * * *

[*Date.*] [*Signature and designation of officer.*]

II.

As to part-payments under section 20.

To—A. B. [*name, etc., of contractor.*]

SIR,—Referring to your claim to the sum of Rs. , I beg to inform you that the sum of Rs. alone is due to you, which amount [*Note:* if any sum is claimable *per contra** from the contractor, *e g.*, for tools not restored, or otherwise, then such words should be added as "*less by Rs. , due by you to Government on account of*" so and so], I am prepared to pay to yourself or to any agent duly authorized by you in this behalf, leaving it open to you to take such action as to the balance claimed by you as you may deem proper.

[*Date.*] [*Signature and designation of officer.*]

No. 23.—To warn transferee as to section 53 of Transfer of Property Act.

No. 23.—It will be observed from the last clause of section 53 of the Transfer of Property Act† that nothing contained in that section impairs the rights of a transferee *in good faith*. In order to negative the plea of good faith,—which must rest on genuine ignorance of the facts which render the transfer voidable under the section,—it may be necessary to promptly communicate the truth to the intending pur-

* On the other hand.
† See page 164 of the Manual.

chaser. For this purpose a form of notice may occasionally be useful:—

To—A. B. [*name, etc., of the intending purchaser.*]

SIR,—As I understand that you are about to purchase [*here briefly but clearly describe the immoveable property in question*], I beg to hereby give you notice that such transfer of the said property will be voidable under section 53 of Act IV of 1882, and to warn you against completing the same.

[*Date.*] [*Signature and designation of officer.*]

No. 24.—When a contractor is not removing his materials, tools, plant, etc., from Government ground he should be unequivocally warned to do so and be allowed a reasonable time for the purpose, before other steps are resorted to. His contract may, or may not, expressly provide for the point. According as it does, or does not, the following notices would do:— No. 24.—To warn contractor to remove his property.

I.

Where the contract expressly provides for the point.

To—A. B. [*name, etc., of contractor.*]

SIR,—I beg to draw your attention to clause of your contract [*here briefly describe the agreement*] and to remind you that you have not cleared the ground as therein provided. I hereby request you to clear it within days [*naming a date which allows ample time*] from this date, in default whereof I shall enforce the provisions of the contract on this subject against you without further notice.

[*Date.*] [*Signature and designation of officer.*]

II.

Where the contract is silent on the point.

To—A. B. [*name, etc., of contractor.*]

SIR,—I beg to remind you that, although your contract [*here briefly describe the agreement*] is at an end, you have not yet cleared the ground made over to you for the purposes of the said contract only, as you were legally bound to do. I hereby request you to clear it within days [*naming a date which allows ample time*] from this date, in default whereof I shall take steps to have it cleared at your expense, and you

will be held responsible for any cost of the operation, besides incurring other liabilities to Government.

[*Date.*] [*Signature and designation of officer.*]

No. 25.—If the Government adopted the suggestion made by the reviser that a clause should be inserted into work contracts providing for the Engineer in charge giving notice to a contractor of his want of progress and requiring him to put more men on within a specified time, (or as the case may be) and on a certificate being given by the engineer that the contractor had failed to comply with the notice, the Government would be entitled to rescind the contract, the following notice might prove useful :—

To—A. B. [*name, etc., of contractor.*]

WHEREAS by clause of the general conditions in the specification annexed to, and incorporated with, the contract made between you and Government, dated the for the construction of power is reserved to Government to determine the said contract upon certifying under his hand that in his opinion you have failed to make proper progress with the said [*here insert "works" etc.*] for days after receiving from him written notice (*to employ more men thereupon, or as the case may be*). And whereas the said has certified under his hand that in his opinion you have failed to make proper progress with the said works for days after receiving from him written notice to (*employ more men*) thereupon. Now take notice that Government, acting under the power reserved to it by clause of the said general conditions, will on (*date*) enter upon the works and take the same entirely out of your hands and determine the said contract as therein provided.

APPENDIX A.

OFFICERS EMPOWERED TO EXECUTE DEEDS, CONTRACTS AND OTHER INSTRUMENTS ON BEHALF OF THE GOVERNMENT.

RESOLUTION OF THE GOVERNMENT OF INDIA IN THE HOME DEPARTMENT (JUDICIAL), No. 3 JUDICIAL—485—501, DATED THE 28TH OF MARCH 1895.

As amended by No. 1 Judicial—14-20, dated 8th January 1897, No. 1579-1608 (Judicial), dated 10th November 1899, No. 1611-1627 (Judicial), dated 4th December 1901, No. 908-24 (Judicial), dated 20th May 1903, No. 955-57, dated 4th June 1904, No. 1104-1121, dated 26th July 1905 and No 1137-1154, dated 27th July 1905.

READ again—

The correspondence on the subject of the execution of deeds, contracts, and other instruments on behalf of Her Majesty's Secretary of State for India in Council ending with the letter from the Government of the Punjab, No 355-S, dated the 25th July 1891.

Read also—

The Home Department Circular to Local Governments and Administrations, No $\frac{5 \text{ Judicial}}{322-331}$, dated the 7th March 1892, forwarding a draft resolution purporting to consolidate the orders issued from time to time on the subject, and replies thereto

[illegible]

third of Victoria, Chapter forty-one, Section two, may be executed as follows :—

A.—In the case of the Governor-General in Council* :—

(1) All deeds and instruments relating to any matters other than those hereinafter specified	By a Secretary to the Government of India.
(2) All deeds and instruments relating to railway matters other than those hereinafter specified.	By the Secretary to the Railway Board.

B.—In the case of the Military Department† :—

I.—In the Military Works Services (subject to any limits fixed by the Government of India)—

1. All instruments relating to purchase, supply and conveyance or carriage of materials, stores, machinery, etc. 2. All instruments relating to the execution of works of all kinds, connected with buildings, bridges, roads, canals, tanks, reservoirs, docks and harbours, and embankments, and also instruments, relating to the construction of water-works, sewage-works and the erection of machinery. 3. Security bonds for the due performance and completion of works	By the Director-General of Military Works, Chief Engineers, Commanding Royal Engineers, Assistant Commanding Royal Engineers and Garrison Engineers.

* NOTE.—Part A as revised by Government of India Resolution No. 1104—1121, Home Department—Judicial, dated the 26th July 1905.

† NOTE.—Part B I—X as revised by Government of India, Resolution No. 1137—1154, Home Department, Judicial, dated the 27th July 1905

4. Security bonds for the due performance of their duties by Government servants whom the officer specified have power to appoint.	By the Director-General of Military Works, Chief Engineers, Commanding Royal Engineers, Assistant Commanding Royal Engineers and Garrison Engineers.
5. Leases for grazing cattle on canal banks or roadsides; for fishing in a canal; for the cultivation of land; leases of water for irrigation and other purposes, and leases of water power; and instruments relating to the sale of grass, trees, or other produce on roadsides or in plantations.	
6. Leases of houses, land, or other immoveable property, provided that the rent reserved shall not exceed Rs. 5,000 a month.	
7. All instruments connected with the reconveyance of property given as security.	
8. Instruments connected with the collection or farming of bridges or ferries or other means of communication provided by the local Government.	
9. Agreements for the recovery of fines on account of drift wood or other timber passing into a canal.	
10. Agreements with temporary establishments.	
11. Agreements entered into in India with civilian mechanics and others for a specified period of service in the Military Works Services.	By the Director-General of Military Works and Chief Engineers.
12. All deeds and instruments relating to any matters other than those specified in heads 1 to 11.	By a Secretary to the Government of India, or a Secretary to a local Government.

II.—Contracts and other instruments for the Ordnance Department as detailed below:—

1. Contracts for stores obtained in India for supplies to arsenals, depôts or factories.	By the Director-General of Ordnance in India and Inspectors-General of Ordnance.
2. Contracts for undertaking sales of unserviceable stores.	
3. Agreements entered into in India with civilian employés for a specified period of service in ordnance establishments.	
4. Contracts for landing, weighing and forwarding ordnance stores.	

5. All instruments connected with the reconveyance of property given as security.	By the Director-General of Ordnance in India, Inspectors-General of Ordnance, Ordnance Officers in charge of arsenals and depôts, and Superintendents of factories.

III.—Contracts for the Supply and Transport Corps as detailed below :—

[NOTE.—When tenders are expressly declared to be intended to take effect as contracts they will not be executed on behalf of the Secretary of State]

1. Contracts for supplies and services to, and purchases from, the Supply and Transport Corps 2. All instruments connected with the reconveyance of property given as security.	By the Secretary to the Government of India, Military Department; Director-General of Contracts and Registration; Directors of Contracts and Registration, Divisional Store Officers, Store and Shipping Officers; Store Officer, Cawnpore; Officers on special duty in Kashmir; Agents for Government Consignments, Calcutta and Madras, and Officers Commanding Stations.
3. Agreements entered into in India with civilian employés for a specified period of service in the Supply and Transport Corps	By the Director-General of Contracts and Registration, and Directors of Contracts and Registration.

IV.—Contracts for Army Clothing Department as detailed below —

1. Contracts for the supply of important articles of local manufacture. 2. Contracts for the supply of embroidered badges, colours and standards. 3. Agreements entered into in India with civilian employés for specified period of service in the Army Clothing Department	By the Director of Army Clothing.
4. Contracts for making clothing either inside or outside factories	By Superintendents of Army Clothing Factories, subject to the approval of the Director of Army Clothing.
5. Contracts for the supply of unimportant articles of local manufacture, and miscellaneous stores required for factory purposes 6. Contracts for undertaking the sale of stores and materials. 7. Contracts for the supply of carts . 8. Petty Contracts	By Superintendents of Army Clothing Factories.

5. Contracts for provisions and medical *comforts*, Kidderpore dockyard.	By the Deputy Director of the Royal Indian Marine.
6. Contracts for sailmaking, Bombay dockyard.	By the Director of the Royal Indian Marine.
7. Contracts for sailmaking, Kidderpore dockyard.	By the Deputy Director of the Royal Indian Marine.
8. Contracts for mess stores, Indian troop service, Bombay dockyard.	By the Resident Transport Officer.
9. Contracts for washing troop bedding, Indian troop service, Bombay dockyard.	By the Resident Transport Officer.
10 Contracts for labour, Kidderpore dockyard. 11. Contracts for manufacture of coir rope, Kidderpore dockyard. 12. Contracts for supply of coal, country (Bengal), Kidderpore dockyard. 13 Contracts for rivetting work, Kidderpore dockyard. 14. Contracts for scraper establishment, Kidderpore dockyard.	By the Deputy Director of the Royal Indian Marine.
15. Contracts for disposal of empty casks returned from Royal Navy vessels, Bombay dockyard.	By the Director of the Royal Indian Marine.
16 Charter parties (hire of transport and for conveyance of troops, etc.), Bombay and Kidderpore dockyards.	By the Director of the Royal Indian Marine and Deputy Director of the Royal Indian Marine.
17. *Agreements for temporary employment of engineers, engine-drivers, and gunners, Bombay and Kidderpore dockyards.*	*By the Director of the Royal Indian Marine and Deputy Director of the Royal Indian Marine*

D.—In the case of the Currency Department, Treasuries and Account Offices.

1. Mortgage-deeds given as security in connection with the employment of officers as Treasurers and the like in Currency Offices and agreements entered into with such officers.	By the Head Commissioner, Commissioner or Deputy Commissioner of Paper Currency.
2 Mortgage-deeds given as security in connection with the employment of officers as Treasurers in District or Sub-District Treasuries, and agreements entered into with such officers	By Collectors or Deputy Commissioners of Districts.

3. Mortgage-deeds given as security in connection with the employment of Treasurers, Cashiers or Clerks in Account Offices, charged with the disbursement of money or the custody and handling of securities.	By the head of the office

E.—In the case of the Public Works Department (subject to any limits fixed in departmental orders):—

I.—All instruments relating to purchase, supply and conveyance or carriage of materials, stores, machinery, etc. II.—All instruments relating to the execution of works of all kinds connected with railways open or under construction, buildings, bridges, roads, canals, tanks, reservoirs, docks and harbours and embankments, and also instruments relating to the construction of water-works, sewage-works, the erection of machinery and the working of coal mines. III.—Security bonds for the due performance and completion of works.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Executive Engineers, in the Buildings and Roads and Irrigation Branches, *Managers, Engineers-in-*Chief, Superintendents of Works, and Executive Engineers in the Railway Branch.
IV.—Security bonds for the due performance of their duties by Government servants whom the officers specified have powers to appoint.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Executive Engineers in the Buildings and Roads and Irrigation Branches, Managers, Engineers-in-Chief, Superintendents of Works, and Executive Engineers in the Railway Branch.
V.—Leases for grazing cattle on canal banks or roadsides; for fishing in a canal; for the cultivation of land under the Irrigation Department; leases of water for irrigation and other purposes, and leases of water power; and instruments relating to the sale of grass, trees, or other produce on roadsides or in plantations.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Divisional officers in the Buildings and Roads and Irrigation Branches, and in Bengal by Sub-Divisional officers of the Irrigation Branch.
VI.—Leases of houses, land, or other immoveable property provided that the rent reserved shall not exceed Rs. 5,000 a month.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Executive Engineers in the Buildings and Roads and Irrigation Branches, Managers, Engineers-in-Chief, Superintendents of Works, and Executive Engineers in the Railway Branch.

5. Contracts for provisions and medical comforts, Kidderpore dockyard.	By the Deputy Director of the Royal Indian Marine.
6. Contracts for sailmaking, Bombay dockyard.	By the Director of the Royal Indian Marine.
7. Contracts for sailmaking, Kidderpore dockyard.	By the Deputy Director of the Royal Indian Marine.
8. Contracts for mess stores, Indian troop service, Bombay dockyard.	By the Resident Transport Officer.
9. Contracts for washing troop bedding, Indian troop service, Bombay dockyard.	By the Resident Transport Officer.
10 Contracts for labour, Kidderpore dockyard.	By the Deputy Director of the Royal Indian Marine.
11. Contracts for manufacture of coir rope, Kidderpore dockyard	
12. Contracts for supply of coal, country (Bengal), Kidderpore dockyard	
13. Contracts for rivetting work, *Kidderpore dockyard.*	
14. Contracts for scraper establishment, Kidderpore dockyard.	
15 Contracts for disposal of empty casks returned from Royal Navy vessels, Bombay dockyard.	By the Director of the Royal Indian Marine
16. Charter parties (hire of transport and for conveyance of troops, etc), Bombay and Kidderpore dockyards.	By the Director of the Royal Indian Marine and Deputy Director of the Royal Indian Marine
17. Agreements for temporary employment of engineers, engine-drivers, and gunners, Bombay and Kidderpore dockyards	By the Director of the Royal Indian Marine and Deputy Director of the Royal Indian Marine

D.—In the case of the Currency Department, Treasuries and Account Offices.

1. [illegible] officers.	By the Head Commissioner, Commissioner or Deputy Commissioner of Paper Currency.
2 Mortgage-deeds given as security in connection with the employment of officers as Treasurers in District or Sub-District Treasuries, and agreements entered into with such officers.	By Collectors or Deputy Commissioners of Districts.

3. Mortgage-deeds given as security in connection with the employment of Treasurers, Cashiers or Clerks in Account Offices, charged with the disbursement of money or the custody and handling of securities.	By the head of the office.

E.—In the case of the Public Works Department (subject to any limits fixed in departmental orders) —

I.—All instruments relating to purchase, supply and conveyance or carriage of materials, stores, machinery, etc. II.—All instruments relating to the execution of works of all kinds connected with railways open or under construction, buildings, bridges, roads, canals, tanks, reservoirs, docks and harbours and embankments, and also instruments relating to the construction of water-works, sewage-works, the erection of machinery and the working of coal mines. III.—Security bonds for the due performance and completion of works.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Executive Engineers, in the Buildings and Roads and Irrigation Branches, Managers, Engineers-in-Chief, Superintendents of Works, and Executive Engineers in the Railway Branch.
IV.—Security bonds for the due performance of their duties by Government servants whom the officers specified have powers to appoint.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Executive Engineers in the Buildings and Roads and Irrigation Branches, Managers, Engineers-in-Chief, Superintendents of Works, and Executive Engineers in the Railway Branch.
V.—Leases for grazing cattle on canal banks or roadsides; for fishing in a canal; for the cultivation of land under the Irrigation Department; leases of water for irrigation and other purposes, and leases of water power, and instruments relating to the sale of grass, trees, or other produce on roadsides or in plantations.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Divisional officers in the Buildings and Roads and Irrigation Branches, and in Bengal by Sub-Divisional officers of the Irrigation Branch.
VI.—Leases of houses, land, or other immoveable property provided that the rent reserved shall not exceed Rs. 5,000 a month.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Executive Engineers in the Buildings and Roads and Irrigation Branches, Managers, Engineers-in-Chief, Superintendents of Works, and Executive Engineers in the Railway Branch.

5. Contracts for provisions and medical comforts, Kidderpore dockyard.	By the Deputy Director of the Royal Indian Marine.
6. Contracts for sailmaking, Bombay dockyard.	By the Director of the Royal Indian Marine.
7. Contracts for sailmaking, Kidderpore dockyard.	By the Deputy Director of the Royal Indian Marine.
8. Contracts for mess stores, Indian troop service, Bombay dockyard	By the Resident Transport Officer.
9. Contracts for washing troop bedding, Indian troop service, Bombay dockyard.	By the Resident Transport Officer.
10. Contracts for labour, Kidderpore dockyard. 11. Contracts for manufacture of coir rope, Kidderpore dockyard 12. Contracts for supply of coal, country (Bengal), Kidderpore dockyard 13. Contracts for rivetting work, Kidderpore dockyard 14. Contracts for scraper establishment, Kidderpore dockyard.	By the Deputy Director of the Royal Indian Marine.
15. Contracts for disposal of empty casks returned from Royal Navy vessels, Bombay dockyard.	By the Director of the Royal Indian Marine
16. Charter parties (hire of transport and for conveyance of troops, etc), Bombay and Kidderpore dockyards.	By the Director of the Royal Indian Marine and Deputy Director of the Royal Indian Marine.
17. Agreements for temporary employment of engineers, engine-drivers, and gunners, Bombay and Kidderpore dockyards.	By the Director of the Royal Indian Marine and Deputy Director of the Royal Indian Marine.

D.—In the case of the Currency Department, Treasuries and Account Offices.

1. Mortgage-deeds given as security in connection with the employment of officers as Treasurers and the like in Currency Offices and agreements entered into with such officers.	By the Head Commissioner, Commissioner or Deputy Commissioner of Paper Currency.
2. [illegible] agreements entered into with such officers.	[illegible] Collectors or Deputy Commissioners of Districts.

F.—In the case of the Telegraph Department—

I.—Contracts and other instruments for works and stores.	By the Director and Deputy Director-General of Telegraphs and the Director of Construction, by Superintendents and Assistant Superintendents of Telegraphs, subject to the limit fixed by Departmental orders.
II.—Leases of houses to the Telegraph Department, containing, where necessary, an agreement making the Government liable for loss by the fire caused by the act of the lessee provided that the rent reserved in such lease shall not exceed Rs 500 a month.	By the Director and Deputy Director-General of Telegraphs.
III—Contracts and other instruments for securities deposited by Telegraph subordinates.	By Superintendents and Assistant Superintendents of Telegraphs, subject to the limit fixed by Departmental orders.

G.—In the case of the Post Office—

I—Contracts and other instruments relating to the business of the Post Office	By the Director-General of the Post Office.
II.—Contracts and other instruments relating to the business of the Post Office managed by a Post Master-General or Officer exercising the powers of a Post Master-General	By such Post Master-General or Officer exercising the powers of a Post Master-General subject to any limit prescribed by Departmental orders.

H—In the case of the Civil Medical Department under the Government of India—

Contracts or other instruments relating to the Medical Department.	By the Surgeon-General with the Government of India.

I—In the case of the Forest Department—

Contracts and other instruments in matters connected with the administration and working of forests and with the business of the Forest Department generally.	By Conservators, Collectors of Districts, Deputy Assistant, Extra Deputy and Extra Assistant Conservators of Forests to such extent and within such limits as the Local Government may prescribe by notification in the official Gazette.

"*In supersession of Punjab Government Notification No 313, dated 10 h May 1895, the Lieutenant-Governor is pleased to prescribe the following revised rules on the subject :—*

"FIRST.—Any Forest Officer appointed by an order in the *Punjab Government Gazette* to hold charge of a Forest Division shall be empowered to enter in and

VII.—All instruments connected with the re-conveyance of property given as security.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Executive Engineers in the Buildings and Roads and Irrigation Branches, Managers, Engineers-in-Chief, Superintendents of Works, and Executive Engineers in the Railway Branch.
VIII.—Instruments connected with the collection or farming of tolls at bridges or ferries or other means of communication provided by the Railway or by the Local Government.	By Chief Engineers, Superintending Engineers, Superintendents of Works, Executive Engineers in the Buildings and Roads and Irrigation Branches, Managers, Engineers-in-Chief, Superintendents of Works and Executive Engineers in the Railway Branch.
IX.—Contracts connected with the loading and unloading of goods and for other matters necessary for, or incidental to, traffic working	By Managers of State Railways.
X.—Contracts connected with the sale of scrap, ashes, and other Surplus materials	By Managers of State Railways.
XI.—Agreements for the recovery of fines on account of drift wood or other timber passing into a canal	By Chief Engineers, Superintending Engineers, Superintendents of Works, and Executive Engineers in the Irrigation Branch.
XII.—Agreements for the interchange of traffic with other State Railways	By Managers of State Railways.
XIII.—Agreements with private guaranteed Railway Companies, Tramway Companies, and other carrying Companies	By Managers of State Railways.
XIV.—*Agreements with Covenanted* Engine-drivers on the expiry of the term of their original covenants.	By Managers of State Railways.
XV.—Agreements with monthly non-pensionable European, Eurasian, and native employés on State Railways, defining the terms and conditions of service to be entered into on entering the service of Government	By Managers, Engineers-in-Chief, Locomotive Superintendents, Traffic Superintendents, Examiners of Accounts, Chief Store-keepers and Executive Engineers in charge of Divisions, District Locomotive Superintendents, and District Traffic Superintendents in the Railway Branch.
XVI.—All deeds and instruments relating to any matters other than those specified in heads I to XV.	By Secretaries and Joint Secretaries of Local Governments.

F.—In the case of the Telegraph Department—

I.—Contracts and other instruments for works and stores.	By the Director and Deputy Director-General of Telegraphs and the Director of Construction, by Superintendents and Assistant Superintendents of Telegraphs, subject to the limit fixed by Departmental orders.
II.—Leases of houses to the Telegraph Department, containing, where necessary, an agreement making the Government liable for loss by the fire caused by the act of the lessee provided that the rent reserved in such lease shall not exceed Rs 500 a month.	By the Director and Deputy Director-General of Telegraphs.
III.—Contracts and other instruments for securities deposited by Telegraph subordinates.	By Superintendents and Assistant Superintendents of Telegraphs, subject to the limit fixed by Departmental orders.

G.—In the case of the Post Office—

I.—Contracts and other instruments relating to the business of the Post Office.	By the Director-General of the Post Office
II.—Contracts and other instruments relating to the business of the Post Office managed by a Post Master-General or Officer exercising the powers of a Post Master-General	By such Post Master-General or Officer exercising the powers of a Post Master-General subject to any limit prescribed by Departmental orders.

H.—In the case of the Civil Medical Department under the Government of India—

Contracts or other instruments relating to the Medical Department.	By the Surgeon-General with the Government of India.

I.—In the case of the Forest Department—

Contracts and other instruments in matters connected with the administration and working of forests and with the business of the Forest Department generally.	By Conservators, Collectors of Districts, Deputy Assistant, Extra Deputy and Extra Assistant Conservators of Forests to such extent and within such limits as the Local Government may prescribe by notification in the official Gazette.

"*In supersession of Punjab Government Notification No. 313, dated 10th May 1895, the Lieutenant-Governor is pleased to prescribe the following revised rules on the subject :—*

"FIRST.—Any Forest Officer appointed by an order in the *Punjab Government Gazette* to hold charge of a Forest Division shall be empowered to enter in and

execute contracts or other instruments in matters connected with the administra-

"SECOND.—Similar powers shall be exercised by the Conservator where such amount or value exceeds Rs. 2,000, but does not exceed Rs. 50,000.

"THIRDLY.—Where such amount or value exceeds Rs. 50,000, the contract shall be executed by the Chief Secretary to Government"—(*Punjab Government Notification No. 425, dated 6th September 1907.*)

J.—In the territories under the administration of the Government of Madras as regards contracts, etc., not hereinbefore specified—

I.—In the case of the Governor in Council— All deeds and instruments relating to any matters other than those specified in heads II to V.	By a Secretary to Government.
II.—Contracts and other instruments for the purchase, supply, conveyance or carriage of building materials, stores, machinery, etc., and the provision of labour for building or other work, and such like engagements.	By Collectors of Districts, Sub-Collectors, Assistant and Deputy Collectors in charge of Divisions, Inspector-General, Deputy Inspector-General, and Superintendents of Police; Commissioner of Police, Madras; Inspector-General of Jails, Superintendent of Stationery, and the Presiding Port Officer and Port Officers.
III.—Contracts and other instruments relating to the Medical Department.	By the Surgeon-General with the Government of Madras.
IV.—(*a*) All contracts, deeds, or other agreements relating to the execution of salt works, or the purchase, sale or transport of salt, the supply of labour, stores, building materials, etc., and any other like engagements relating to the salt revenue or the business of the Salt Department	By the Commissioner of Salt, Abkari and Separate Revenue.
(*b*) All contracts, deeds or other agreements relating to the execution of salt works or the purchase, sale or transport of salt, the supply of labour, stores, building materials, etc., and any other like engagements relating to the salt revenue or the business of the Salt Department within their respective jurisdictions and within the limit of value of Rs. 5,000; and contracts or agreements for the import of foreign salt on	By the Deputy Commissioner of Salt and Abkari Revenue.

credit, for payment of the duty leviable thereon, or contracts or agreements for the clearance of salt under the credit system on the deposit of securities within the limit of value of Rs. 50,000. (c) Leases granted to manufacturers of salt in blocks of land in Government factories when the estimated value of the land concerned does not exceed Rs. 250.	By the Deputy Commissioner of Salt and Abkari Revenue.
(d) Contracts or agreements for the import of foreign salts on credit, for payment of the duty leviable thereon, or contracts or agreements for the clearance of salt under the credit system wholesale on the deposit of securities within the limit of value of Rs 10,000	By Assistant Commissioners of Salt and Abkari Revenue.
V.—Contracts and other instruments relating to matters connected with the Educational Department.	*By the Director of Public Instruction.*

K.—In the territories under the administration of the Government of Bombay as regards contracts, etc., not hereinbefore specified—

I.—All deeds and instruments relating to matters other than those specified in heads II to VII and IX to XIV and XVI to XXI.	By a Secretary to Government.
II.—Contracts for supply of the articles, dead stock, or petty supplies.	By the Government officer for whose use such articles or petty supplies are required, or by any Government officer to whom such officer is subordinate.
III.—Contracts for the sale of useless articles.	By the Government officer for whose office such useless articles are, or by any Government officer to whom such officer is subordinate.
IV.—Contracts for lease or sale of Government buildings.	[illegible]
V.—Contracts for hire or purchase of buildings for Government.	Jointly by the chief local officer of the Department for which, and the chief local officer of the district in which, such buildings are to be hired or purchased.

VI.—Contracts and other instruments for the purchase, supply and conveyance or carriage of building materials, stores, machinery, etc., and contracts for petty constructions and repairs and for public works of every description which are not executed by the Public Works Department.	Jointly by the chief local officer of the Department by which and the chief local officer of the district in which such works are to be executed, or by an Assistant or Deputy Collector if the work is executed by the Revenue Department.
VII.—Sanads— (a) continuing or confirming exemption from payment of land revenue, or (b) continuing or confirming any pension or grant of money or land revenue, or (c) confirming watan-service—commutation settlements, or (d) guaranteeing cash payments in lieu of abkári or other rights, or (e) granted under section 133 of the Bombay Land Revenue Code, 1879, or any other law for the time being in force relating to the survey of towns and cities.	By Collectors of Districts.
VIII.—Deeds, contracts, and instruments relating to land, or to any benefit arising out of land, or to water, or to any benefit arising out of water, or to land revenue.	In the City of Bombay, by a Secretary to Government; elsewhere, by Collectors of Districts: or in any business connected with the duties of the Talukdári Settlement Officer, by that officer.
IX.—Contracts for the farm of tolls, taxes, duties, cesses or revenues of any description.	By Collectors of Districts, or by the Heads of the Departments by which such tolls, duties, cesses or revenues are levied.
X.—Contracts for the erection or repair of boundary marks.	By Survey Officers or Revenue Officers not lower in rank than Mahalkáris.
XI.—Contracts for the supply of stationery, etc., to the Superintendent of Stationery.	By the Superintendent of Stationery, Bombay.
XII.—Contracts for the supply of articles of any description for the use of jails or regarding the sale of articles manufactured in jails.	By the Inspector-General of Prisons, Bombay, or by the Superintendents of Jails.

XIII.—Security bonds for the due performance of their duties by Government servants whom the Inspector General of Prisons has power to appoint.	By the Inspector-General of Prisons, or by the Superintendents of Jails.
XIV.—*Contracts for the supply of* articles procured in the local markets for the Police.	By the Commissioner of Police in the City of Bombay; and elsewhere, by the Inspector-General of Police, or by District Superintendents of Police.
XV.—Deeds, contracts, and instruments relating to salt revenue or to the business of the Salt Department, or to the land, buildings or other property in the control of that Department, other than contracts of the nature specified above in Articles I to VI.	In Sind, by the Commissioner in Sind or by the Head of the Salt Department in that Province, or by Collectors of Districts; and elsewhere, by a Secretary to Government, or by the Collector of Salt Revenue, Bombay.
XVI.—Contracts entered into with normal scholars and apprentices in Engineering or Industrial Colleges, etc.	By Educational Inspectors or by the Principals of such Colleges.
XVII.—Agreements and deeds entered into with Managers of Educational Institutions in respect of Government grants-in-aid up to Rs 1,000 or in respect of the lease of Government school buildings.	By the Director of Public Instruction, Bombay.
XVIII.—Contracts for supply of the articles procured in the local markets for hospitals, lunatic asylums, etc.	By the local Medical Officer in charge of such hospitals, asylums, etc.
XIX.—Deeds, contracts, and instruments of every description relating to the administration of Aden.	By the Political Resident, Aden.
XX.—Contracts for the purchase and supply of stores and building materials and for the provision of labour, also indentures to bind apprentices at the Mint for a definite term.	By the Mint Master, Bombay.
XXI.—Deeds, contracts, and instruments of every description not included in any of the foregoing articles.	In Sind, by the Commissioner in Sind.

L.—In the territories under the administration of the Government of Bengal as regards contracts, etc, not hereinbefore specified—

I.—In the case of the Lieutenant-Governor— All deeds and instruments relating to matters other than those specified in heads II to VII.	By the Secretary to the Government of Bengal in the Revenue and General Departments.
II.—Contracts for the supply of stationery (and Bonds of employés when it is necessary that they should be executed by the obligee), etc., to the Superintendent of Stationery.	By the Superintendent of Stationery, Calcutta.
III.—Contracts for supply of clothing, etc., for the Police.	By the Commissioner of Police, Calcutta, and the Inspector-General of Police, Bengal.
IV.—Contracts for the supply of articles, etc, for the use of jails, or regarding the sale of articles manufactured in jails	By the Inspector-General of Jails, Bengal.
V.—Contracts for the supply of articles, and for repairing, cutting, etc., roads and canals.	By Collectors of Districts.
VI.—Contracts for the supply of articles procured in the local markets for hospitals, lunatic asylums, etc.	By the local Medical Officers in charge of such hospitals, asylums, etc.
VII.—Contracts and other instruments in matters connected with the lease or sale of land.	By Collectors of Districts and Deputy Commissioners.
VIII.—Contracts for the purchase and supply of stores and building materials and for the provision of labour; also indentures to bind apprentices at the Mint for a definite term.	By the Mint Master, Calcutta.

M.—In the territories under the administration of the Government of the United Provinces of Agra and Oudh, as regards contracts, etc., not hereinbefore specified—

I.—In the case of the Lieutenant-Governor and Chief Commissioner— All deeds and instruments relating to matters other than those specified in heads II to IV.	By a Secretary to Government.
II.—Contracts and other instruments for sums not exceeding Rs. 2,000 except those which affect real estate.	By all Heads of Departments.

III.—Contracts and other instruments at present executed by Collectors, Deputy Commissioners, and Deputy Collectors.	By Collectors and Deputy Commissioners
IV.—Contracts and other instruments for a sum not exceeding Rs. 500, and not affecting real estate.	By subordinate officers appointed by Heads of Departments, with the approval of the Local Government.

X.—In the territories under the administration of the Government of the Punjab, as regards contracts, etc., not hereinbefore specified.

I.—In the case of the Lieutenant-Governor— All deeds and instruments relating to matters other than those specified in heads II to IV and VI and VII.	By a Secretary to Government.
II.—*Contracts and other instruments connected with [illegible] minor works not under the Public Works Department and the supply of necessaries for depôts.	[illegible]
III.—*Contracts and other instruments in matters connected with the lease or sale of land.	By Deputy Commissioners.
IV.—Contracts relating to any matter falling within their ordinary jurisdiction	By Deputy Commissioners.
V.—(a) Instruments of free grant of proprietary right in land. (b) Instruments whereby property is mortgaged to the Government as security for a loan (c) Instruments of exchange of land.	By a Secretary to Government and Deputy Commissioners
VI.—Contracts for the supply of clothing, etc., for the Police	By the Inspector-General of Police.
VII.—Contracts for the supply of articles for use in jails, or regarding the sale of articles manufactured in jails	By the Inspector-General of Prisons.

* As revised by Government of India Resolution Nos 955—57, Home Department-Judicial, dated the 4th June 1904

O.—In the territories under the administration of the Chief Commissioner of the Central Provinces, as regards contracts, etc., not hereinbefore specified—

I.—In the case of the Chief Commissioner— All deeds and instruments relating to matters other than those specified in head II.	By his Secretary.
II.—Contracts and other instruments in matters connected with the lease or sale of land.	By Deputy Commissioners.

P.—In the territories under the administration of the Chief Commissioner (now Lieutenant-Governor) of Burma, as regards contracts, etc., not hereinbefore specified—

I.—In the case of the Chief Commissioner (now Lieutenant-Governor)— All deeds and instruments relating to matters other than those specified in heads II to IV.	By a Secretary to Chief Commissioner (now Lieutenant-Governor).
II.—Contracts and other instruments for the supply of stores, rations, clothing, etc.	By the Heads of the Jail and Police Departments.
III.—Contracts and other instruments relating to matters connected with their respective Departments	By all Heads of Departments.
IV.—Contracts and other instruments connected with the lease or sale of land and fisheries; and contracts relating to any matter falling within their ordinary jurisdiction.	By Deputy Commissioners.

Q.—In the territories under the administration of the Chief Commissioner of Assam (now Lieutenant-Governor of Eastern Bengal), as regards contracts, etc., not hereinbefore specified—

I.—In the case of the Chief Commissioner (now Lieutenant-Governor)— All deeds and instruments relating to matters other than those specified in heads II to V.	By his Secretary.
II.—Contracts and other instruments in matters connected with the lease or sale of land, ferries and fisheries, spontaneous products and minerals, for the supply of stores, building materials, labour, and such like engagements.	By Deputy Commissioners.

III.—Contracts and other instruments connected with temporary leases of land or of other rights, dues or property of Government or for the supply of stores, building materials, labour, and such like engagements when such contract, instrument or engagement does not exceed the value of Rs 500.	By Assistant Commissioners and Sub-Divisional Officers.
IV.—Contracts and other instruments connected with leases of land.	By Extra Assistant Commissioners and Settlement Officers.
V.—Contracts for the supply of articles required for the use of the Department, and other instruments connected with the administration of the Department.	By all Heads of Departments.
R.—In the case of the Chief Commissioner of Coorg as regards contracts, etc, not hereinbefore specified.	By his Secretary.

S.—In the Hyderabad Assigned Districts, as regards contracts, etc , not hereinbefore specified—

I.—All deeds and instruments relating to matters other than those specified in heads II and III.	By the Resident at Hyderabad, the First Assistant Resident, Commissioners and Deputy Commissioners in the Hyderabad Assigned Districts.
II —Contracts for the supply of clothing, etc , for the Police.	By the Inspector-General of Police.
III.—Contracts for the supply of articles required for jails.	By the Inspector-General of Jails.

T.—In British Baluchistan and the territories administered by the Agent to the Governor-General in Baluchistan as such Agent—

I.—All deeds and instruments relating to matters other than those specified in heads II to V.	By the First Assistant to the Agent to the Governor-General and Chief Commissioner
II.—Contracts and other instruments for the supply of stores, clothing, etc	By Heads of Departments concerned.
III.—Contracts and other instruments relating to matters connected with their respective Departments.	By all Heads of Departments.

IV.—Contracts and other instruments connected with the lease or sale of land, or whereby land is mortgaged to Government in security for a loan, and contracts and instruments relating to any matter falling within their ordinary jurisdiction, including the execution of civil works not under the Public Works Department.	By Political Agents and Deputy Commissioners.
V.—Sanads— (a) containing or conferring exemption from payment of land revenue; (b) containing or conferring any pension or grant of money connected with the land revenue; (c) contracts and instruments relating to any matter falling within jurisdiction of the Settlement Department.	By the Revenue Commissioner.
VI.—Agreements for the recovery of advances under the Land Improvement Loans Act, XIX of 1883, and the Agriculturists' Loans Act, XII of 1884.	By District Officers.

CONTRACTS WITH CANTONMENT AUTHORITIES.

No 1597—1608.

Extract from the Proceedings of the Government of India in the Home Department (Judicial),—under date Calcutta, the 10th November 1899.

[illegible]

Contracts referred to in section 59 of the Cantonment Code.	(a) By the Secretary to the Cantonment Committee in cantonments where there is such a Committee and (b) by the Commanding Officer of the Cantonment in those cases in which a Cantonment Committee has not been constituted.

EXECUTION OF LEASES OF BUILDING SITES ON GOVERNMENT LANDS IN CANTONMENTS.

No. 1300—72.

Extract from the Proceedings of the Government of India in the Home Department (Judicial),—under date Simla, the 15th September 1899

RESOLUTION.—In exercise of the power conferred by the East India Contracts Act, 1870 (33 and 34 Vict., C. 59), and of all other powers enabling him in this behalf, the Governor-General in Council is pleased, in supersession of existing orders on the subject, to declare that the undermentioned classes of instruments referred to in section 2 of the Government of India Act, 1859 (22 and 23 Vict., C. 41), may be executed as follows :—

Leases of building sites on Government lands in cantonments.	By the Principal Staff Officer of the Command.

NOTE.—The provisions of Chapter V of the Cantonment Code (sections 59—65) should be referred to as to the persons by whom, and the manner in which, contracts may be made, sanctioned and executed.

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APPENDIX B.

STATUTORY RULES AS TO THE MAKING OF CERTAIN CONTRACTS ON BEHALF OF THE GOVERNMENT.

RESOLUTION OF THE GOVERNMENT OF INDIA, IN THE DEPARTMENT OF FINANCE AND COMMERCE, No. 933 Ex., DATED THE 20TH FEBRUARY 1894.

READ—

Resolution by the Government of India in the Finance and Commerce Department, No. 5712, dated the 20th October 1888.

Despatch to Her Majesty's Secretary of State for India, No. 101 (Public Works), dated the 4th December 1888.

Despatch from Her Majesty's Secretary of State for India, No. 46 (Public Works), dated the 15th August 1889.

Letter from the Government of India in the Finance and Commerce Department, to all Local Governments and Administrations, No 850, dated the 21st February 1890

Despatch to Her Majesty's Secretary of State for India, No. 229 (Financial), dated the 18th August 1891.

Despatch from Her Majesty's Secretary of State for India, No. 39 (Public Works), dated the 4th August 1892

Despatch to Her Majesty's Secretary of State for India, No. 163 (Financial), dated the 30th May 1893.

Despatch from Her Majesty's Secretary of State for India, No 46 (Public Works), dated the 12th October 1893.

[illegible]

the State.

STATUTORY RULES.

The following provisions and restrictions are prescribed by the Secretary of [illegible]

works, shall be made or entered into by the Government of India to, with or in favour of any person, firm, syndicate, company, municipality or other public body for any of the purposes above mentioned, without the express sanction of the *Secretary of State in Council*,—

if such concession, grant, lease or contract—

(a) is intended to endure for a period exceeding *ten years* and is *not accompanied* by an *unconditional power of revocation* on cancelment by the Government of India, at any time during such period on the expiry of six months' notice to that effect, and imposes on the revenues of India an *annual liability* in excess of *fifty thousand* rupees; or

(b) imposes on such revenues a charge or expenditure or liability damage in excess of *twelve lakhs* of rupees; or

(c) involves the cession of property or rights of which the estimated value exceeds *twelve lakhs* of rupees.

without the express sanction of the *Government of India and of the Secretary of State in Council*,—

If such concession, grant, lease or contract—

(a) is intended to endure for a period exceeding *ten years* and is *not accompanied* by an *unconditional power of revocation* or cancelment by the Government of India at any time during such period on the expiry of six months' notice to that effect, and imposes on the revenues of India an annual liability in excess of *fifty thousand rupees*; or

(b) imposes on such revenues a charge or expenditure or liability to damages in excess of *twelve lakhs* of rupees; or

(c) involves the cession of property or rights of which the estimated value exceeds *twelve lakhs* of rupees.

III.—No such concession, grant, lease or contract shall be made by any Local Government or Administration or other authority in India to, with or in favour of any person, firm, company, municipality or other public body for any of the purposes above mentioned without the express sanction of the *Government of India*,—

if such concession, grant, lease or contract,—

(a) is intended to endure for a period exceeding *five years* and is *not accompanied* by an unconditional power of revocation by the Government at any time during such period on the expiry of six months' notice to that effect, and imposes on the revenues of India an annual liability in excess of *five thousand* rupees, or

(b) imposes on such revenues a charge or expenditure or liability to damages in excess of *one lakh* of rupees; or

(c) involves the cession of property or rights of which the estimated value exceeds *one lakh* of rupees.

IV.—No such concession, grant, lease or contract shall be made by any Local Government or Administration or other authority in India to, with or in favour of any *joint-stock company*, except with the sanction of the *Government of India*, and subject to these rules so far as the same may be applicable.

V.—No transfer of any such concession, grant, lease or contract, or of any part thereof, or any interest therein, or any under-letting shall be recognised as valid except it be made with the express assent of—

(a) the *Secretary of State in Council* in cases falling within Rule I or Rule II;

(b) the *Government of India* in cases falling within Rule III, and

(c) the *Local Government or Administration* in any other case; with the proviso that a transfer or under-letting to a company will in all cases require the sanction of the *Government of India*;

and the Secretary of State in Council and the Government of India, as the case may be, may in his or their absolute discretion refuse such assent.

VI.—In every writing intended to express any concession, grant, lease or contract which falls within these rules, it shall be expressly declared that such concession, grant, lease or contract is granted or made subject to them.

VII.—When the assent of the Secretary of State in Council is rendered by these rules necessary to the validity of any concession, grant, lease or contract, or to the transfer thereof, it shall be signified under the hand of an Under-Secretary of State; and when the assent of the Government of India is so required it shall be signified under the hand of a *Secretary of that Government.*

VIII.—The foregoing Rules I to VII inclusive shall not apply to any concession, grant, lease or contract, for any of the purposes mentioned in Rule I, if made under any special rules issued or approved by the Secretary of State in Council.

SUPPLEMENTARY RULES.

Rule A.—In cases where it is considered expedient to grant concession or to make agreements, such as those contemplated in the Statutory Rules, the deed of concession, or the agreement, if the rights under it are transferable, must be so framed that it will be beyond the power of the grantees or contractees to transfer their rights, or any part of them, except with the sanction of the Government of India or of Local Governments and Administrations in cases coming within their cognizance.

B.—All such concessions and agreements will further be subject to any special provisions made by Government to meet particular cases or particular classes of cases.

C.—Before any concession or agreement of the class referred to is submitted for the approval of the Government of India, its terms should be considered in the Judicial Department of the Local Government, and by the highest legal adviser to that Government.

D.—The foregoing rules shall not apply to any concession, grant, lease or contract for any of the purposes mentioned in the Statutory Rules, if made under any special rules issued or approved by the Secretary of State in Council.

APPENDIX C.

P W. D. CODE, VOL. I, CHAPTER VIII.—CONTRACTS.

CONTRACTS FOR THE EXECUTION OF PUBLIC WORKS.

749 The term "contract," as used in this code, has a limited and technical [illegible]

chases of materials or stores For such classes of agreements it is left to Local Governments to frame such subsidiary rules as may be suitable to the special circumstances of each province

750. A "Manual for the guidance of officers of the Public Works Department in their relations with contractors" has been published for the general guidance and assistance of executive officers The instructions contained in it must, however, be followed subject to the orders in para. 328 which require a reference to competent authority before entering upon legal proceedings.

751. Contracts for the execution of Public Works are usually of three classes—

I.—Works of construction or repair under supervision in which the Contractor undertakes to provide the whole or part of the labour, material or plant required by the Engineer and to perform the work under his direction.

II.—Supply of materials

III.—Maintenance, in which the Contractor engages to maintain certain works in a specified condition of efficiency. This kind of contract is admissible in exceptional cases only.

752 Contracts of each class may be of three kinds, *viz.*, Lump-sum, Schedule, and a combination of these two

753 In a lump-sum contract the Contractor engages to execute the work with all its contingencies for a fixed sum A purely lump-sum contract is not of frequent occurrence, as it is generally necessary to provide for alterations in the original design which subsequently may be found necessary.

754. Schedule contracts are those in which the Contractor undertakes to execute the work of fixed rates, the sum he is to receive depending on the quantities and kinds of work done or materials supplied.

[illegible]

757 No person under the rank of [illegible]

to a Local Government, on behalf of the Local Government, up to the limits within which the Local Government can sanction estimates for works; but when these last named tenders are exceeded, the tender must be referred for the orders of the Government of India.

758. Contracts and other instruments connected with leases for grazing cattle on canal banks may be executed by officers in charge of canal divisions.

759. It is not the intention to prevent the officers mentioned in para. 757 giving out to different Contractors a number of contracts relating to one work which is [illegible]

760. Before a work is given out on contract the Executive Engineer shall prepare "contract documents" to include—

1st.—A complete set of drawings showing the general dimensions of proposed work, and, so far as necessary, details of the various parts.

2nd.—A complete specification of the work to be done and of the materials to be used, unless reference can be made to some Standard Specification —see para. 655.

3rd.—A schedule of the quantities of the various descriptions of work.

4th.—A set of "conditions of contract" to be complied with by the person whose tender may be accepted.

761. [illegible]

[illegible]

1st.—The place where and the time when the contract documents can be seen and the blank forms of tender obtained; also the amount, if any, to be paid for such forms of tender.

2nd.—The place where, the date on which and the time when tenders are to be submitted and are to be opened (in the case of large contracts this should be at least one month after the date of the first advertisement or notice).

3rd.—The amount of earnest money to accompany the tender, and the amount and nature of security deposit required in the case of the accepted tender.

4th.—With whom or what authority, the acceptance of the tender, will rest.

5th.—Authority should always be reserved to reject any or all of the tenders so received without the assignment of a reason and this should be expressly stated in the advertisement.

763. For lump-sum contracts, the tenders should be in Public Works Department Form G. In the case of schedule contracts, there are the following alternatives:—

(a) Tenders may be required to be made at a percentage above rates in the Executive Engineer's estimate, in which case a schedule of the estimated rates should be attached to the specification, and the tender should be in Form F, or,

(b)

In the case of piece-work when the nature of the work is simple, Form K— will be found suitable.

764. When the work partakes of the nature of both a lump-sum and schedule contract, a form of tender can be framed by combining P. W. D. Form G with Forms F. and I. P. W. D. Form H is a convenient form of tender for the supply of materials

with the Government service—see also para. 374.

766 As a rule no tender for the execution of works of any description should be received unless accompanied by the deposit of cash as earnest money to the extent which has been notified as necessary by the Executive Engineer or other officer.

768 Usually the lowest tender should be accepted, unless there be some objection to the capability of the Contractor, the security offered by him, or his execution of former work. At the same time the acceptance or rejection of tenders is left entirely to the discretion of the officer to whom the duty is entrusted and no explanation can be demanded of the cause of the rejection of his offer by any person making a tender Such an explanation may be called for by superior authority if considered necessary.

ment, will generally suffice.

770. Security, accompanied by a bond where necessary, should in all cases be taken for the due fulfilment of a contract. This security may be—

(a) A deposit of cash where the amount does not exceed Rs. 500, Government Securities, Municipal Debentures, Port Trust Bonds and deposit receipts of recognised banks (approved of by Local Governments or Administrations) which publish regular accounts.

(b) A deduction of 10 *per cent.* from the monthly payments to be made on account of work done.

(c) Personal security of two persons of known probity and wealth.

771. When the bond is for more than Rs. 5,000, Form L must be used; in all other cases and when sureties are dispensed with, Form L—I should be used

772. The rules for dealing with deposits and any interest accruing thereon are laid down in paras. 1340 to 1352. All expense connected with renewal, con-

773. The employment of Contractors for the performance of any work in no way relieves Engineer or other officers from responsibility as to the manner or time in which the work is done. Contracts framed agreeably to the foregoing rules give the Engineer full power to act for himself in cases in which the Contractor delays or fails to do the work to his satisfaction.

Principal of the Lawrence Military Asylum, Sanawar, for the recovery of fees not exceeding Rs 500 on account of children due to the Asylum from parents and guardians;

General Officer Commanding Districts as regards all litigation connected with regimental funds;

In all other cases the Financial Commissioner of the Punjab;

NOTE.—The Financial Commissioner has been relieved of the control which he had exercised over litigation connected with regimental funds (Government of India, Home Department, No. 1260, dated 16th July 1903).

(b) "Suit" means a suit by or against or affecting the Government or a [illegible]

official capacity is a party or has any interest;

NOTE.—References to Courts made under the Land Acquisition Act, 1894, fall within this definition.

The provisions of these rules apply to all suits by or against Cantonment Committees and to suits by or against District Boards and Municipal Committees in respect of nazul land and other Government property of which the management and control has been entrusted to such Boards or Committees.

(c) "Officer in charge of the case" means the Law Officer, Legal Practitioner or Government Officer appointed to conduct the proceedings on behalf of the Government, or a public officer in any suit

Principles governing legal proceedings by or against or affecting the Government or public officer in his public capacity

Suits by the Government only to be brought in the last resort. No [illegible]

2. (1) No suit is to be brought on behalf of the Government except in the last resort, when all other means of obtaining satisfaction have failed.

NOTE.—The institution of a suit on behalf of the Government is not to be recommended to or [illegible]

(2) No person having a just claim against the Government, should be compelled to resort to litigation to enforce it

NOTE.—When any person threatens to bring a suit against the Government it is incumbent on the proper departmental officers and controlling authorities to satisfy themselves without delay of the justice or otherwise of the whole and every part of the claim made. All reasonable efforts being made to bring about an amicable adjustment, without an appeal to the law, as far as this can be done without sacrificing the just rights of the Government.

* Section 80 of the present Code.

The object of the notice prescribed by section 424* of the Code of Civil Procedure is to allow ample time to the Government to inquire into the justice or otherwise of all claims and to effect a settlement of all just claims before a suit is brought, and the best use should be made of the opportunity thus given by the law towards equitably and amicably adjusting claims.

Communications with the opposite party.

Communications to the opposite party to be made "without prejudice." Tender.

3 All communications made to the opposite party, on the subject of matters in respect of which it is possible that a suit may ensue, shall be headed "*without prejudice*," and, if made orally, shall be stated to be made "*without prejudice*."

NOTE.—No admission is relevant, or can be proved in evidence if it is made upon the express or implied condition that evidence of it is not to be given, but there must be no mistake as to the intention of the party making it.

Restrictions as to access to and the production and supply of copies of documents in the possession of the Government.

4 [illegible] arise or has arisen.

(2) When notice to produce documents in charge of a head of a department or public officer is received by him, he shall consider whether they include *communications made in official confidence*, the production of which would be injurious to the public interest. To the production of such documents he shall make definite objection direct to the Court or through the officer in charge of the case.

necessary sanction before access is allowed to documents in the possession of the Government.

(3) All correspondence with and resolutions and orders of the Government are strictly confidential. No officer shall grant copies of any such documents during the pendency of any dispute or suit to which they in any way relate to any person other than to a proper officer of the Government or to the officer in charge of the case, and no such copies shall be granted at any time after the final decision of the suit without the previous sanction of the head of the department concerned.

5. [illegible]

a certified copy retained

Procedure in Suits

Sanction to suits by or against or affecting the Government or a public officer in his official capacity

6. No suit on behalf of the Government or a public officer, as such, shall be instituted without the previous sanction of the proper controlling authority.

7. The sanction of the authority empowered to sanction the institution of a suit of any kind shall be obtained for the defence of a suit of such kind.

Sanction to bring a suit on behalf of the Government or a public officer.

8. (1) Any officer who considers that a suit should be instituted on behalf of the Government shall submit a clear and detailed report, as provided in Rule 17—

Report to be submitted by officer who considers that a suit should be instituted on behalf of the Government

(*a*) the circumstances which, in his opinion, render the institution of the suit necessary, and precisely when and where they each occurred;

(*b*) the subject of the claim and the relief sought;

(*c*) the steps which have been taken to obtain satisfaction of the claim without bringing a suit;

(*d*) the pleas or objections (if any) which have been urged by the proposed defendant against the claim;

(*e*) the evidence, both oral and documentary, which is believed to be obtainable, and which it is proposed to adduce in support of the claim;

(*f*) whether the documents (if any) referred to in clause (*e*) are registered or not;

(*g*) whether or not the circumstances of the person against whom it is proposed to institute the suit are such as to render it likely that execution will be obtained of any decree that may be given against him;

(*h*) the evidence, both oral and documentary, which, so far as is known, the proposed defendant will be able and is likely to adduce in his defence;

(i) whether the documents (if any) referred to in clause (h) are registered or not;

(j) any

(k) whether the amount required for stamp or other expenses is likely to be above Rs. 500.

(2) Copies of all documents referred to in sub-clauses (e) and (h) of the preceding clause, and of all correspondence and written proceedings, whether in English or in the vernacular (together, in the latter case, with translations), connected with the proposed suit, should accompany the report, with an exact list of the same, wherever this is reasonably possible If these copies cannot

department concerned.

Endorsement to be made on "notice" and action thereupon

9. (1) When notice of an intended suit is given, under the provisions of section 424* of the Code of Civil Procedure, the officer to whom it is delivered or the head of the office at which it is left shall forthwith endorse, or cause to be endorsed, on the notice—

(a) the date of receipt,

(b) the manner of delivery,

(c) the date of endorsement, and

(d) the signature of the officer making the endorsement, and shall thereupon proceed as hereinafter provided.

(2) If the notice is served upon an officer other than an officer specified in section 424† of the Civil Procedure Code, that officer shall forthwith transmit it, in original, to the Deputy Commissioner or head of the department concerned

(3) If the notice is served on a Secretary to the Local Government, that officer shall forward it, in original, to the Deputy Commissioner or head of the department concerned, and shall at the same time, forward a certified copy of the notice and of the endorsement made thereon, to the Legal Remembrancer, for information.

(4) If the notice is served on or forwarded to the Deputy Commissioner under the provisions of sub-section (2) of this rule, that officer shall forward a certified copy of the notice and of the endorsement made thereon to the Legal Remembrancer, for information, and—

(a) *if the subject-matter of the threatened suit is connected with district administration and within his control*, or is unconnected with any particular department,—proceed in the manner hereinafter in these rules provided;

(b) *if the subject-matter of the threatened suit is connected with a department not within his control*,—forward the notice, in original, to the head of the department concerned, in order that he may so proceed.

(5) In every case in which the officer on whom a notice is served, transmits it in original, to any other officer, he shall retain a certified copy of the notice and of the endorsement made thereon, and place the same on record

Departmental officer to consider whether the claim is, in whole or in part, to be admitted and adjusted or contested.

10. (1) The district or departmental officer concerned shall, immediately on

legal action as he may deem proper

NOTE.—If an officer is in doubt, at this stage, as to any legal point, he should submit the case, in due course, to the Legal Remembrancer, for opinion.

* Section 80 of the present Code.

† Section 80.

(2) When notice of the intention of any person to sue the Government or a public officer has been given, under section 424* of the Code of Civil Procedure no communication should ordinarily be made to such person otherwise than under the advice of the Legal Remembrancer or other Law Officer of the Government. Action thereupon.

* Now section 80.

(3) When, after receiving any such notice and inquiring into the matter, the controlling authority proposes to—

(a) tender any amount admitted to be due to the claimant,

(b) offer terms of adjustment or suggest reference to arbitration,

[illegible]

Court

[illegible]

Procedure on receipt of summons.

[illegible] Deputy Commissioner.

(a) endorse thereon the date of receipt, and sign and date the endorsement;

[illegible] 2 of

in the summons

NOTE —In this Province the Deputy Commissioner is the only officer empowered by the Government to receive service of process in suits against the Government. (Notification No 1191, dated 2nd September 1899)

[illegible]

Procedure to be observed in regard to the defence of suits brought against public officers.

21. (1) When any suit is threatened to be brought [illegible]

NOTE.—In the case of a suit intended to be brought [illegible]

* Section 80

† Order XXVII, rule 7.

(2) The Head of the Department will forward the report, together with his opinion thereupon, to the Local Government for orders as to whether the suit is to be defended at the public expense or whether the officer concerned is to be left to take such measures in the case at his own expense, as he thinks fit.

[illegible]

(3) If the defence of the suit at the public expense is sanctioned by the Local Government, the controlling authority shall arrange therefor If such sanction is not given, the officer concerned shall be informed accordingly, and will be at liberty to make his own arrangements in connection therewith.

NOTE.—If a public officer who is concerned in a case [illegible]

Action on the termination of a suit.

22. Immediately on the termination of any suit, a copy of the judgment and decree or other final order of the Court shall be procured, through the Deputy Commissioner, without delay by the officer in charge of the case.

Results of suits, etc., by and to whom report to be submitted.

23. Immediately on receipt of the copies specified in the last preceding rule, the officer in charge of the case shall submit a report of the result of the suit, for the information of the controlling authority. The report shall be submitted through the Legal Remembrancer.

When the result is adverse to the Government and will involve a disbursement of public money, the report should state when the money will be required so as to enable the controlling authority to make arrangements accordingly.

APPEALS, ETC., BY OR AGAINST THE GOVERNMENT OR A PUBLIC OFFICER.

Appeals on behalf of the Government or a Public Officer.

Report as to whether appeal should be made

[illegible]

be forwarded as soon as possible afterwards. If the proper officer considers that no appeal or application should be made, he shall submit a report accompanied as aforesaid, to that effect

NOTE.—As the period within which appeals and applications may be made is limited by law, there should be no delay in submitting reports and recommendations under this rule.

Appeals to the Privy Council.

26. Appeals to His Majesty in Council will be dealt with, under the special orders of the controlling authority, by the Legal Remembrancer in accordance with the following instructions :— Appeals to His Majesty in Council.

(1) Where a decision adverse to the Government has been given by the Chief Court or the Financial Commissioner of the Punjab in a suit or appeal to which the Government is a party and from which an appeal lies to His Majesty in Council, the Legal Remembrancer will procure copies of the final judgment and such other portion of the record as he may think necessary to a clear under-

* Sections 100—112 and Order XLIV.

(4) It will also be the duty of the Legal Remembrancer to prepare, if practicable before the transcription of the record has been completed, a statement embodying the facts of the case under appeal and the principal points on which the Government should in his opinion

the Government in the Indian Courts.

(5) This statement shall be printed at the Government Press, Lahore, and copies will be forwarded to the Chief Secretary to the Government with a view to their transmission to the Secretary of State for India in Council.

(6) Upon receipt of notice from the Registrar of the Chief Court under the rules for the time being in force, that the transcripts record has been despatched to the Registrar of the Privy Council, the Legal Remembrancer shall forthwith communicate to the Solicitor to the Secretary of State for India in Council the fact that the record has been despatched and the date of its despatch.

[illegible]

of the Government to defend the appeal.

(8) All costs incurred in connection with the proceedings in a Government suit subsequent to its final decision by the Chief Court or Financial Commissioner and relating to the appeal from such decision to the Privy Council, shall be chargeable to the department concerned, in the same way as the costs of the original suit

(9) All communications made under the foregoing rules by and between officers of the Punjab Government shall be regarded and treated as confidential.

EXECUTION OF DECREES.

Settlement of decree adverse to Government.

27. [illegible]

* Section 82

Where the decree is against a public officer, in respect of an act, purporting to have been done by him in his official capacity, it will rest with him to satisfy the same within the time fixed.

Procedure when decree is in favour of Government.

28. [illegible]

Measures taken to t out prope judgment debtor as to secu † Order X rule 5

29. [illegible]

required security is not satisfactory.

NOTE.—The following instructions are to be observed :—

(1) If an appeal is instituted, and the execution of the decree is stayed by order of the Court, the interval before the decision of the appeal should be made use of in making inquiries as to the property of the judgment-debtor.

(2) When the officer concerned is not the Deputy Commissioner or a subordinate of the Deputy Commissioner, he may apply to the Deputy Commissioner to assist him in prosecuting the necessary inquiries as to the property of the judgment-debtor

‡ Order XLI, rule 6.

(3) [illegible]

(4) If such application be refused, the Deputy Commissioner, or other officer in consultation as aforesaid, shall endeavour to keep a watch on the property of the debtor so as to prevent any fraudulent alienation or concealment of it

Cost in pauper suits.

30. The amount of stamp duty and other costs due to the Government in pauper suits is to be recovered by proceedings in execution of decree.

§ Order XXXIII, rules 10 and 11.

NOTE.—Pauper suits are instituted without payment of Court-fees, and sections 411§ and 412§ of the Code of Civil Procedure provide for the recovery of the amount of the fees which should have been paid if the plaintiff had not been allowed to sue as a pauper.

In cases governed by section 411,* it is not necessary for the Government to bring a separate suit, but the amount of the Court-fee can be realized from the property, the subject-matter of the suit, by proceeding in execution

* Order XXXIII, rule 10.

Under paragraph 7 of section XXII of the Chief Court's *Instructions to Judicial Officers* (Volume II) Civil Courts are required, whenever a decision is passed in a pauper suit, to inform the Collector of the amount payable to the Government as stamp dues, with such other particulars as will enable him to recover the same.

1900, paragraph 51, page 236)

siders that the progress made in the recovery of the moneys due to the Government is unsatisfactory ment

NOTE.—The following instructions are to be observed —

(1) Any sum due to the Government under a decree may, if this course is feasible, be recovered otherwise than through the agency of the Court, but the Deputy Commissioner is required, under section 258† of the Code of Civil Procedure, to certify every such recovery to the Court

† Order XXI, rule 2

INTERVENTION.

32 (1) If it appear advisable to a Deputy Commissioner or to the head of any department, on the representation of any subordinate officer or otherwise, Procedure when intervention is deemed neces-

(2) The controlling authority will decide whether the Government shall intervene or not, and, if so, will arrange as to the person by whom the necessary action shall be taken

(3) If the controlling authority decide that it is necessary to intervene and the Government be made a party to the suit, all the rules for the conduct of Government suits, shall, so far as may be, deemed applicable to the case.

DISBURSEMENTS ON THE CONDUCT OF SUITS AND THEIR ADJUSTMENT.

33 (1) When sanction has been given to institute a suit at the public expense

suits instituted on behalf of the Government.

(2) Further items that may arise will be dealt with in the same way. All expenditure in excess of Rs. 500 in one suit will be referred to the controlling authority for sanction.

Expenditure in excess of Rs. 500 to be referred to controlling authority for sanction.

(3) All such items, whether sanctioned separately or included in contingent bills, will be denoted as on account of "Law charges" of the department concerned.

All recoveries to be credited to the department concerned.

34. All recoveries made, whether on account of the principal sum sued for or costs, will be credited to the department concerned.

Earliest opportunity is to be taken to adjust advances

35. In urgent cases, where money may have been advanced from other sources, the earliest opportunity should be taken for adjusting such advances in accordance with these rules.

Cases under the Land Acquisition Act.

Land acquisition cases

36. Cases which are referred to the Court under Part III of Act I of 1894 (The Land Acquisition Act) need not ordinarily be referred under these rules, [illegible] but [illegible] ing [illegible] to [illegible]

APPENDIX E.

CIVIL PROCEDURE CODE, SECTIONS 79—82.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

79 (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council. *Suits by or against Government.*

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power declared by section 111 of the East India Company Act, 1813

81 In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity— *Exemption from arrest and personal appearance.*

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

(b) where the court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person

of the Local Government

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

All recoveries to be credited to the department concerned.

34. All recoveries made, whether on account of the principal sum sued for or costs, will be credited to the department concerned.

Earliest opportunity is to be taken to adjust advances.

35. In urgent cases, where money may have been advanced from other sources, the earliest opportunity should be taken for adjusting such advances in accordance with these rules

CASES UNDER THE LAND ACQUISITION ACT.

Land acquisition cases.

36. Cases which are referred to the Court under Part III of Act I of 1894 (The Land Acquisition Act) need not ordinarily be referred, under these rules, to the controlling authority, through the Legal Remembrancer, for orders, but that officer is to be consulted, in the ordinary course, as to any points involving legal doubts or difficulties, in respect of such cases. Rules 22 and 23 apply to such cases.

APPENDIX E.

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(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power declared by section 111 of the East India Company Act, 1813

80 No suit shall be instituted against the Secretary of State for India in Council [illegible] Notice.

[illegible]

plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left

81 In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity— Exemption from arrest and personal appearance.

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

(b) where the court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person

82 [illegible] Secretary of State for India in Council [illegible] Execution of

[illegible]

of the Local Government

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

APPENDIX F.

THE INDIAN ARBITRATION ACT NO. IX OF 1899.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the 3rd March 1899.*)

An Act to amend the Law relating to Arbitration

Whereas it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Indian Arbitration Act, 1899.

(2) It extends to the whole of British India; and

(3) It shall come into force on the first day of July 1899.

Application.

2. Subject to the provisions of section 23, this Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency-town:

Provided that the Local Government, with the previous sanction of the Governor General in Council, may, by notification in the local official Gazette, declare this Act applicable in any other local area as if it were a Presidency-town.

Exclusion of certain enactments in certain cases where Act applies

3. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, I of 187 and sections 523 to 526 of the Code of Civil Procedure shall not apply to any XIV of submission or arbitration to which the provisions of this Act for the time being apply:

Provided that nothing in this Act shall affect any arbitration pending in a Presidency-town at the commencement of this Act or in any local area at the date of the application thereto of this Act as aforesaid, but shall apply to every arbitration commenced after the commencement of this Act or the date of the application thereof, as the case may be, under any agreement or order previously made:

Provided, also, that nothing in this Act shall affect the provisions of the Indian Companies Act, 1882, relating to arbitration. VI of 18

Definitions.

4. In this Act, unless there is anything repugnant in the subject or context,—

(a) "the Court" means, in the Presidency-towns, the High Court, and, elsewhere, the Court of the District Judge; and

(b) "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not

Submission to be irrevocable except by leave of Court

5. A submission, unless a different intention is expressed therein, shall be irrevocable, except by leave of the Court.

Provisions implied in submission.

6. A submission, unless a different intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule, in so far as they are applicable to the reference under submission.

Reference to arbitrator to be appointed by third person.

7. The parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein.

Such person may be designated either by name or as the holder for the time being of any office or appointment.

Illustration.

The parties to a submission may agree that any dispute arising between them in respect of the subject-matter of the submission shall be referred to an arbitrator

to be appointed by the Bengal Chamber of Commerce, or, as the case may be to an arbitrator to be appointed by the President for the time being of the Bengal Chamber of Commerce

8. (1) In any of the following cases :— Power for the Court in certain cases to appoint an arbitrator, umpire or third arbitrator.

(a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

(b) if an appointed arbitrator neglects or refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy ,

(c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him ;

(d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy ;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator, umpire or third arbitrator.

[illegible] after the service [illegible] gave the notice, [illegible], appoint an arbi- [illegible] power to act in the reference and make an award as if he had been appointed by consent of all parties.

9 Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed therein,— Power for parties in certain cases to supply vacancy.

(a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies or is removed, the party who appointed him may appoint a new arbitrator in his place ,

(b) if, on such a reference, one party fails to appoint an arbitrator, either [illegible]

Provided that the Court may set aside any appointment made in pursuance of clause (b) of this section

10. The arbitrators or umpire acting under a submission shall, unless a different intention is expressed therein,— Powers of arbitrator.

(a) have power to administer oaths to the parties and witnesses appearing ;

(b) have power to state a special case for the opinion of the Court on any question of law involved ; and

(c) have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

11. (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice to the parties of the making and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award. Award to be signed and filed

(2) The arbitrators or umpire shall, at the request of [illegible]

(3) Where the arbitrators or umpire state a special case under section 10, clause (b), the Court shall deliver its opinion thereon; and such opinion shall be added to, and shall form part of, the award.

Power for Court to enlarge time for making award

12. The time for making an award may, from time to time, be enlarged by order of the Court, whether the time for making the award has expired or not.

13. (1) The Court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire

Power to remit award.

(2) Where an award is remitted under sub-section (1), the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award within three months after the date of the order remitting the award.

Power to set aside award

14. Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award.

Award when filed to be enforceable as a decree

15. (1) An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court.

(2) An award may be conditional or in the alternative.

Illustration.

A dispute concerning the ownership of a diamond ring is referred to arbitration. The award may direct that the party in possession shall pay the other party Rs 1,000, the said sum to be reduced to Rs 5 if the ring is returned within fourteen days.

Power to remove arbitrator or umpire.

16. Where an arbitrator or umpire has misconducted himself, the Court may remove him

Costs

17. Any order made by the Court under this Act may be made on such terms as to costs or otherwise as the Court thinks fit

Forms

18 The forms set forth in the second schedule, or forms similar thereto, with such variations as the circumstances of each case require, may be used for the respective purposes there mentioned, and, if used, shall not be called in question.

Power to stay proceedings where there is a submission

19. Where any party to a submission to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter [illegible]

Power for High Court to make rules

20. The High Court may make rules consistent with this Act as to—

(a) the filing of awards and all proceedings consequent thereon or incidental thereto;

(b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto;

(c) the transfer to Presidency Courts of Small Causes for execution of awards filed, where the sum awarded does not exceed two thousand rupees;

(d) the staying of any suit or proceeding in contravention of a submission to arbitration; and,

(e) generally, all proceedings in Court under this Act.

Amendment of section 21 Act I, 1877

21. [illegible] Act, 1877, after the words "Code, I of 1877.
[illegible] res "and the Indian Arbitration Act,
[illegible] 'a controversy" the words "present or
[illegible]

22. The provisions of this Act shall be binding on the Crown. Crown to be bound.

23. (1) This Act shall apply within the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted within those local limits. Special provision as to application of Act to Rangoon.

(2) For the purposes of this Act, the local limits aforesaid shall be deemed to be a Presidency-town and the Recorder of Rangoon shall have all the powers of a High Court.

THE FIRST SCHEDULE.

(*See section 6*)

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

I. If no other mode of reference is provided, the reference shall be to a single arbitrator.

II. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

III The arbitrators shall make their award in writing within three months [illegible] act by notice in [illegible] later day to which [illegible] e to time, enlarge [illegible]

IV If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators

V [illegible]

VI [illegible] the arbitrators or umpire may require.

VII The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath.

VIII The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

IX. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

(*See section 18*)

Form I.

Submission to single arbitrator.

In the matter of the Indian Arbitration Act, 1899 :—

Whereas differences have arisen and are still subsisting between A. B. of and C. D. of ; concerning

Now we, the said A. B. and C. D., do hereby agree to refer the said matter in difference to the award of X. Y.

(*Signed*) A. B.

C. D.

Dated the , 19 .

Form II.

Submission of particular dispute to single arbitrator.

In the matter of the Indian Arbitration Act, 1899 :—

Whereas differences have arisen and are still subsisting between A B. of and C. D. of ; concerning

Now we, the said A. B. and C. D., do hereby agree to refer the said matter in difference to the award of X. Y.

(*Signed*) A B.

C. D.

Dated the , 19 .

Form III.

Appointment of single arbitrator under agreement to refer future differences to arbitration

In the matter of the Indian Arbitration Act, 1899 :—

Whereas, by an agreement in writing, dated the day of , 19 , and made between A. B. of and C. D. of , it is provided that differences arising between the parties thereto shall be referred to an arbitrator as therein mentioned ;

And whereas differences within the meaning of the said provision have arisen and are still subsisting between the said parties concerning ;

Now we, the said parties, A. B. and C. D., do hereby refer the said matters in difference to the award of X. Y.

(*Signed*) A. B.

C. D.

Dated the , 19 .

FORM IV.

Enlargement of time by arbitrator by endorsement on submission.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A. B. of and C. D. of :—

I hereby enlarge the time of making my award in respect of the matters in difference referred to me by the within (*or* above) submission until the day of 19 .

(*Signed*) X. Y.,
Arbitrator.

Dated the , 19 .

FORM V.

Special case.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A. B. of and C. D of :—

The following special case is, pursuant to the provisions of section 10, clause (*b*), of the said Act, stated for the opinion of the

* :—

* Here specify the Court.

(*Here state the facts concisely in numbered paragraphs*)

The questions of law for the opinion of the said Court are :—

First, whether———————————————————

Secondly, whether———————————————————

(*Signed*) X. Y.,
Arbitrator.

Dated the , 19 .

FORM VI.

Award

In the matter of the Indian Arbitration Act, 1899, and an arbitration between A. B. of and C. D. of :—

Whereas in pursuance of an agreement in writing dated the day of , 19 , and made between A B. of and C. D. of the said A. B and C D. have referred to me, X. Y., the matters in difference between them concerning (*or as the case may be*) ;

Now I, the said X. Y., having duly considered the matters submitted to me, do hereby make my award as follows :—

I award—

(1) that———————————————————

(2) that———————————————————

(*Signed*) X. Y.,
Arbitrator

Dated the , 19 .

APPENDIX G.

P. W. D. PRESCRIBED FORMS F, G, H, I, K1, K2, Q

P. W. D. Form No. F.

(To take the place of Government of India Form No 110 A., Madras Forms Nos 156 and 176, and Bengal Form No. 7 M.)

NOTES.

1. When a contract is entered into

as the contract, or

(*b*) an agreement in Form Q and a Bond in Form L or L-1 should be executed (*see* notes on Forms Q, L and L-1).

For signature, see Rule 2 within.

SCHEDULE RATE CONTRACT.

Tender and conditions

P. W. D. Form No. F.

PUBLIC WORKS DEPARTMENT.

TENDER FOR WORKS

I or we hereby tender for the execution of the under-mentioned work at per cent the rates entered in the special estimate of the Executive Engineer, Division, for the said work :—

Memo. of Work tendered for.

No of work	Name of work.	Amount of Estimate	Date for commencement of work.	Date for completion of work.	No. and amount of Currency Notes which accompany as earnest-money.

Should this Tender be accepted, hereby agree to abide by and fulfil all the terms of the above memo and all the conditions of contract annexed hereto, or, in default thereof, to forfeit and pay to the Secretary of State *for India in Council, or his successors*, the penalties or sums of money mentioned in the said conditions The sum of R in currency notes is herewith [illegible]

being accepted

Dated————————

The——————————19 .

The above Tender is hereby accepted by me on behalf of the Secretary of State for India in Council

Dated————————

The——————————19 .

16. All work under execution by contract shall at all times be open to the in-

18. The Contractor shall give due notice in writing to the Executive Engineer his Assistants to measure any work which is going to be covered up or otherwise

placed beyond the reach of measurement, in order that the correct dimensions may [illegible]

[illegible]

Contractor.

[illegible]

may be awarded in consequence

21. No work is to be done on Sundays without the written permission of the Executive Engineer.

[illegible]

23 In the case of partners tender [illegible] change in the individuals of the Firm [illegible] may sign such Tender. Any such [illegible] ontractors to the Executive Engineer [illegible]

[illegible]

Witnesses.

Signature of Contractor,

Residence.

GENERAL RULES AND DIRECTIONS FOR THE GUIDANCE OF CONTRACTORS.

[illegible]

2 In the event of the Tender being submitted by a Firm, it must be signed separately by each member thereof, or, in the event of the absence of any partners, it must be signed on his behalf by a person holding a Power-of-Attorney authorizing him to do so.

3. Receipts for payments made on account of a work when executed by a Firm must also be signed by the several partners, except in the case of well known and recognized Firms, and except where the Contractors are described in their Tender or contract as a Firm.

4 The amount of earnest-money to be deposited will be —

		R	R
If the amount of the Executive Engineer's estimate does not exceed	. . . .	2,000	50
Ditto exceeding Rs 2,000 and not exceeding	. . .	5,000	100
Ditto Ditto Rs. 5,000 ditto ditto	. . .	10,000	200
and for each additional Rs. 5,000, or portion of Rs. 5,000, a further sum of	. . . .		100

and such earnest money is to be deposited in currency notes

5 [illegible]

rejected. No single Tender is to include more than one work; but Contractors who wish to tender for two or more works are to submit a separate Tender for each. Tenders are to have the name and number of the work to which they refer written outside the envelope.

6 [illegible]

7. The Executive Engineer shall have the right of rejecting the whole or any of the Tenders.

MEMORANDUM OF MATERIALS TO BE SUPPLIED FROM THE PUBLIC WORKS STORE FOR THIS WORK.

Particulars.	Rate at which the material will be charged to the Contractor.				Place of Delivery.
	Unit.	*Rs.*	*a*	*p.*	

Note.—The person or firm submitting the Tender should see that the rates in the above Memorandum are filled up by the Executive Engineer on the issue of the form prior to submission of Tender.

(Signature of Executive Engineer.)

(Signature of Contractor.)

P. W. D. Form No. G.

(To take the place of Government of India Form No. 110A.)

TENDER FOR A LUMP-SUM CONTRACT.

Tender and conditions.

NOTES.

The names, addresses and descriptions of any two persons proposed as securities must be given in their own handwriting. Should it be proposed to give any other kind of security allowed by the conditions, the particulars must be entered in the last column of the table within

N.B.—If earnest-money is deposited, the tender must be accompanied by cash, [illegible]

[illegible]

cepted, or in case of its acceptance, on [illegible]

[illegible]

(a) the tender should be treated as the contract, or

(b) an agreement in Form Q and a bond in Form L or L-1 should be executed (see notes on Forms Q, L and L-1)

2. For signature see rule 1 within.

P. W. D. Form No. G.

TENDER FOR A LUMP-SUM CONTRACT.

( ) do hereby tender to execute the whole of the work described in the specification signed by—————— and dated—————— (hereunto annexed) for the sum of R—————— and should this tender be accepted—————— do hereby agree and bind—————— to abide by and fulfil all the conditions annexed to the said Specification or in default thereof to forfeit and pay to His Majesty's Secretary of State for India in Council the penalties or sums of money mentioned in the said conditions, viz. :— [I or we] [myself or ourselves]

Dated——————

——————*Signature of party tendering.*

——————*Address.*

—————— . . . . . *Signature of witness.*

—————— . . . . . *Address.*

SECURITIES.

NAME	Address.	Occupation or profession.	

P. W. D. Form No. G.

GENERAL RULES AND DIRECTIONS FOR THE GUIDANCE OF CONTRACTORS.

1. In the event of the tender being submitted by a firm it must be signed separately, by each member thereof, or, in the event of the absence of any partner, it must be signed on his behalf by a person holding a Power of-Attorney authorising him to do so.

	R	R
If the amount of the tender does not exceed . .	2,000 .	50
If exceeding R2,000 and not exceeding . . .	5,000 .	100
Ditto R5,000 ditto . . .	10,000 .	200
and for each additional R5,000 or portion of R5,000 a further sum of		100

and such earnest-money is to be deposited in currency notes.

4. The Executive Engineer or his Assistant will open tenders in the presence of any intending Contractors who may be present at the time, and will enter the several tenders in a schedule. In the case of tenders not exceeding

posal.

5. The Executive Engineer shall have the right of rejecting the whole or any of the tenders.

NOTES.

1. When a contract is entered into either of the following courses should be followed:—

(a) The tender should be treated as the contract, or

(b) An agreement in Form Q and a bond in Form L or L-1 should be executed (see notes on Forms Q, L and L-1).

2. For signature see rule 1 within.

P. W. D. Form No. H.

(To take the place of Government of India Form No. 111 and Madras Form No 157.)

SUPPLY OF MATERIALS.

Tender and conditions.

P. W. D. Form No. G.

GENERAL RULES AND DIRECTIONS FOR THE GUIDANCE OF CONTRACTORS.

1. In the event of the tender being submitted by a firm it must be signed separately, by each member thereof, or, in the event of the absence of any partner, it must be signed on his behalf by a person holding a Power of-Attorney authorising him to do so.

2. Receipts for payments made to a firm must be signed by the several partners, except in the case of well-known and recognised firms, and except where the Contractors are described in their tender or contract as a firm.

3. The amount of earnest-money to be deposited will be—

	R	R
If the amount of the tender does not exceed	2,000	50
If exceeding R2,000 and not exceeding	5,000	100
Ditto R5,000 ditto	10,000	200
and for each additional R5,000 or portion of R5,000 a further sum of		100

and such earnest-money is to be deposited in currency notes.

4. [illegible]

posal.

5. The Executive Engineer shall have the right of rejecting the whole or any of the tenders.

NOTES.

1. When a contract is entered into either of the following courses should be followed :—

(a) The tender should be treated as the contract, or

(b) An agreement in Form Q and a bond in Form L or L-1 should be executed (see notes on Forms Q, L and L-1).

2. For signature see rule 1 within.

P. W. D. Form No. H.

(To take the place of Government of India Form No. 111 and Madras Form No 157)

SUPPLY OF MATERIALS.

Tender and conditions.

P. W. D. Form No. H.

PUBLIC WORKS DEPARTMENT.

TENDER FOR THE SUPPLY OF MATERIALS.

CONDITIONS OF CONTRACT.

☞ *N. B.—No person under the rank of Executive Engineer, or officiating as such, can accept any tender or make a contract for Public Works.*

An Executive Engineer can only accept tenders and make contracts under R2,000 in amount for Public Works.

A Superintending Engineer can only accept tenders and make contracts under R10,000 for Public Works.

1. The person whose tender may be accepted shall, before the date fixed

2. [illegible]
in the
on the
shall e

[illegible]

2.

[illegible]

P. W. D. Form No H.

6. On the completion of the delivery of materials, the Contractor shall be furnished with a certificate to that effect, but the delivery will not be considered complete until the Contractor shall have removed all rejected materials, and shall have the approved materials stacked or placed in such position as may be pointed out to him.

[illegible]

9. In the event of the material being considered by the Executive Engineer [illegible]

[illegible]

11. The contractor shall supply at his own expense all tools, plant and implements required for the due fulfilment of his contract, and the material shall remain at his risk till the date for final delivery, unless it shall have been in the meantime removed for use by the Executive Engineer or his Assistant.

12. No materials shall be brought to site or delivered on Sundays without the written permission of the Executive Engineer.

[illegible]

collected or engagements entered into.

14. The decision of the Superintending Engineer for the time being shall be final, binding, and conclusive on all questions relating to the meaning of the Specification.

P. W. D. Form No. H.

GENERAL RULES AND DIRECTIONS FOR THE GUIDANCE OF CONTRACTORS.

1. In the event of the tender being submitted by a firm, it must be signed separately by each member thereof, or, in the event of the absence of any partner, it must be signed on his behalf by a person holding a Power-of-Attorney authorising him to do so.

2. Receipts for payments made to a firm, must be signed by the several partners except in the case of well-known and recognised firms, and except where the Contractors are described in their tender on contract as a firm.

3. The amount of earnest-money to be deposited will be—

	R	R
If the amount of the Tender does not exceed	2,000	50
If exceeding R2,000 and not exceeding . .	5,000	100
Ditto R5,000 ditto	10,000	200
and for each additional R5,000 or portion of R5,000 a further sum of		100

and such earnest-money is to be deposited in currency notes.

[illegible]

5. The Executive Engineer shall have the right of rejecting the whole or any of the tenders.

P. W. D. Form No. I.

(*Bengal Form 15M.*)

CONVEYANCE OF MATERIALS.

Tender and conditions.

NOTES.

1. When a contract is entered into either of the following courses should be followed :—
   (*a*) the Tender should be treated as the contract, or
   (*b*) an agreement in Form Q and a bond in Form L or L-1 should be executed (*see* notes on Forms Q, L and L-1).

For signature, *see* Rule 1 within.

PUBLIC WORKS DEPARTMENT.

TENDER FOR THE CONVEYANCE OF MATERIALS.

I or we the undersigned do hereby tender for the conveyance of the materials described in the following schedule, subject to the conditions hereunto annexed at the rates specified:—

SCHEDULE.

Description of materials.	Total quantity to be conveyed.	From (place)	To (place)	Rate of payment to be made. Amount.	Rate of payment to be made. Per	Date for commencement of delivery at site.	Quantity to be delivered in each period of
				Rs.			

Should this Tender be accepted hereby agree to abide by and fulfil all

conditions. Currency notes for Rs. are herewith forwarded as earnest-money, the full value of which is to be absolutely forfeited to the said Secretary of State or his successors should not deposit the full amount of security in accordance with clause 1 of the conditions of contract in the event of this Tender being accepted.

Dated——————————

The——————————

The above Tender is hereby accepted by me on behalf of the Secretary of State for India in Council.

Dated——————————

The——————————

CONDITIONS OF CONTRACT.

1. [illegible] ... [illegible] (10) ten per cent. on the cost of the work undertaken [illegible] sums due, or which may become due, to him by Government

2. The Contractor is to deliver the full quantity of materials noted in the schedule within each as noted in the Tender, commencing from the date specified therein, failing which he shall be subject to pay or allow one-tenth of the security deposit for every day, not exceeding ten days, that he shall omit or neglect to do so, as and for liquidated damages.

3. In every case in which the payment or allowance mentioned in clause 2 shall have been incurred for ten consecutive days, the Executive Engineer shall have power either to annul the contract altogether, or to have the supply completed without further notice at the Contractor's risk and expense, as he may deem best suited to the interests of Government, and the Contractor shall have no claim to compensation for any loss that he may incur in any way.

4. Delivery of the material is to be taken by the Contractor at or and the material is to be deposited by the Contractor at such place within the limits of the site of the as may be pointed out by the subordinate in charge of the work. Materials are to be stacked regularly in such a manner as may be directed to admit of their being easily counted or measured

5. On obtaining an indent for any materials, it will be the Contractor's duty to ascertain when the material will be available at under no consideration can any claim for demurrage be entertained in the event of his carts, boats, or other means of carriage being detained at or elsewhere.

6. The Contractor will be responsible for breakages and loss sustained in transit if in excess of the percentage allowed in the following schedule :—

Kind of material	Percentage of loss allowed.
Bricks	1 per cent.
Soorkee	5 per cent.
Lime	3 per cent

and the value of the materials so lost or injured shall be deducted from the payments that may be due to him

7. If the materials are carried by bo[illegible]

8. Payments will be made to the extent of nine-tenths the quantity delivered during each month. But all such payments made shall be considered as payments on account, to be covered by the final bill for the complete supply.

9. If the Contractor or his work-people break or deface any building, road, fence, enclosure or grass land, or cultivated land, he shall make good the same at his own expense, and in the event of his refusing or failing to do so, the damage shall be repaired at his expense by the Executive Engineer, who shall deduct the cost from any sums due or which may become due to the Contractor.

10. No materials shall be brought to site or delivered on Sundays without the written permission of the Executive Engineer.

[illegible] compensation for any loss that may accrue from engagements he may have entered into.

12. The decision of the Superintending Engineer for the time being shall be final, binding and conclusive on all questions relating to the meaning of the specification.

Signature of Contractor.

Witnesses.

Residence.

GENERAL RULES AND DIRECTIONS FOR THE GUIDANCE OF CONTRACTORS.

2. Receipts for payments made to a Firm must be signed by the several partners, except in the case of well-known and recognized Firms, and except where the Contractors are described in their tender or Contract as a Firm.

3. The amount of earnest-money to be deposited will be—

	Rs.	Rs.
If the amount of the tender does not exceed	2,000	50
If exceeding Rs 2,000 and not exceeding	5,000	100
Ditto Rs 5,000 ditto	10,000	200
and for each additional Rs 5,000 or portion of Rs 5,000 a further sum of		100

and such earnest-money is to be deposited in currency notes.

submit the several Tenders to the higher Officers of the Department for disposal.

5. The Executive Engineer shall have the right of rejecting the whole or any of the Tenders.

P. W. D. Form No. K1.

NOTES.

1. When a contract is entered into either of the two following courses should be followed :—

(a) The tender should be treated as the contract, or

(b) An agreement in Form Q and a bond in Form L should be executed (see notes on Forms Q and L)

2 For signature see rule 2 within (page 295).

Form for contracts at Schedule Rates for works or repairs.

P. W. D. Form No. K1.

FORM FOR CONTRACTS FOR WORKS OR REPAIRS.

At Schedule rates.

---

hereinafter called the Contractor hereby agree

with the Secretary of State for India in Council, represented by

Executive Engineer, Division, acting under the orders of the , that is to say, the Contractor agree and bind as aforesaid to execute for the said Secretary of State in the most substantial and workmanlike manner, and with materials of the best quality and to the complete satisfaction of the said Executive Engineer, or the Executive Engineer for the time being hereinafter called the Executive Engineer, such of the works mentioned and described

as are enumerated in the following schedules, and such extra work as the Contractor may be called upon to perform ;

2 AND the Contractor further agree to conform minutely to all instructions for drawings issued by the said Executive Engineer ;

3. AND the Contractor further agree to supply all labour, materials, [illegible]

may arise ;

4 AND the Contractor further agree to be responsible for all materials, scaffolding, tools and plant, etc , supplied by Government, and to use them only for the purposes of this Contract, and agree to make good any loss, damage, wastage, or undue wear and tear that may take place from whatever cause, or to pay for the same to the said Secretary of State such sum as the said Executive Engineer may determine ;

When there are two or more partners insert the letter s after Contractor ; and when there is only one Contractor insert the letter s after agree.

P. W. D. Form No. K1.

5. And the Contractor further agree to execute the several kinds of work at the rates mentioned in the following schedule.—

Schedule.

No. and para. of the Specifications.	DESCRIPTION. (*Detail materials, tools and plant, etc., if any, to be supplied to Contractor.*)	Unit of calculation.	Rate.

P. W. D. Form No. K1.

6. AND the Contractor further agree that any extra expense incurred owing to neglect or omission, or the neglect or omission of any of them,* may be deducted from any sum due or to become due on this contract, or may be recovered from security;

7. AND the Contractor further agree to proceed with the works with due diligence, and

8. AND the Contractor further agree that if due diligence be not

for the same, and hereby agree to make good any expense thereby incurred;

9. AND the Contractor further agree not to bring any bad, inferior

10. AND the Contractor further agree that all work is to be measured by standard measure, and, according to the rules and custom of the Public Works Department in the presidency, without reference to any local custom:

11. AND the Contractor further agree that no work is to be sublet without the permission of the said Executive Engineer given under his hand;

12. AND the Contractor further agree that the price of any altered or extra work shall be agreed upon in writing before it is commenced, otherwise the Contractor shall be entitled to no payment for any such work and the Executive Engineer may, if he so please, employ other persons to carry out such work; and that no alteration can be made in the terms of this contract, except by a stamped and duly executed agreement;

13. AND the Contractor further agree that the work is to be measured up as soon as possible

14. AND the Contractor further agree to make out and furnish to the said Executive Engineer bills, in duplicate, in the proper form at the rates mentioned in the above schedule within seven days after the measurements have been made, and payment for per cent. thereof is to be made as soon as the bill has been checked and corrected by the said Executive Engineer;

15. AND the Contractor further agree to execute no work on Sundays without written permission;

16. AND the Contractor further agree that the said Executive Engineer shall be sole judge of the quality of the materials, and the soundness or nature and sufficiency of the work provided, done and executed in pursuance of this contract;

* If there is only one Contractor erase the words "or the neglect or omission of any of them."

P. W. D. Form No. Q.

ARTICLES OF AGREEMENT made the day of 19 , between THE SECRETARY OF STATE FOR INDIA IN COUNCIL of the one part and hereinafter called the Contractor of the other part.

WHEREAS the Contractor ha agreed with the said Secretary of State for the performance of the works set forth in the Tender hereunto annexed and marked as Schedule A upon the conditions therein mentioned and WHEREAS the performance of the said works is an act in which the public are interested, and is entered into under the orders of the Government of AND WHEREAS the Contractor ha deposited in

(Or if a bond is taken instead of a deposit it should be recited here)

Signature of on behalf of the Secretary of State for India in Council ______________________

Signature of the party or partners tendering. ______________________

Signatures of witnesses to signature of the party or partners tendering. ______________________
____

APPENDIX H.

GLOSSARY OF LEGAL AND TECHNICAL TERMS USED IN THE MANUAL

(FOR DEFINITIONS, SEE PAGES CITED.)

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V

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A

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* As the sub-headings under one or two of the Acts (*e.g.*, CONTRACT ACT) are very numerous, it has been thought best to arrange all sub-headings under every Act alphabetically.

G

M

Q

R

S

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